THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346.4
Lx · North Gall.

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—Sir Roundell Palmer, Knt., M.P., Q.C.

EX-OFFICIO MEMBERS.

The Attorney-General, Sir R. P. Collier, Knt., M.P.
The Solicitor-General, Sir J. D. Coleridge, Knt., M.P.
The Queen's Advocate-General, Sir Travers Twiss, Knt.

ELECTED MEMBERS.

Mr. Serjeant O'Brien Mr. Serjeant Pulling	Serjeants' Inn.
Sir Roundell Palmer, Knt., M.P., Q.C. R. P. Amphlett, Esq., M.P., Q.C.	Lincoln's Inn.
William Forsyth, Esq., Q.C. H. Warwick Cole, Esq., Q.C.	Inner Temple.
T. W. Greene, Esq., Q.C. John Gray, Esq., Q.C.	Middle Temple.
John A. Russell, Esq., Q.C. William Cracroft Fooks, Esq., Q.C.	Gray's Inn.
William Williams, Esq. (Firm—Messrs. Currie and Williams), Lincoln's Inn Fields W. S. Cookson, Esq. (Firm—Messrs. Cookson, Wainewright, Pennington, & Wainewright), 6, New Square, Lincoln's Inn	Incorporated Law Society.

Secretary—James Thomas Hopwood, Esq., 3, New Square, Lincoln's Inn.

THE

LAW REPORTS.

Equity Cases,

INCLUDING

Bankruptcy Cases,

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

EDITED BY G. W. HEMMING, BARRISTER-AT-LAW.

VOL. XI.

1870-1.—XXXIV VICTORIÆ

LONDON:
Printed for the Incorporated Council of Law Reporting for England and Wales
BY WILLIAM CLOWES AND SONS,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.

1871.

BIBL. LONDIN

BIBL.
LONDIN.
UNIV.

NAMES OF REPORTERS.

LORD CHANCELLOR AND LORDS JUSTICES . .	CHARLES MARETT, H. CADMAN JONES, MARTIN WARE,	*Barristers-at-Law.*
MASTER OF THE ROLLS .	J. H. FORDHAM, JAMES STIRLING,	*Barristers-at-Law.*
V.-C. STUART. . . .	J. W. DE LONGUEVILLE GIFFARD, T. F. MORSE,	*Barristers-at-Law.*
V.-C. MALINS . . .	T. W. GUNNING, W. E. M. TOMLINSON,	*Barristers-at-Law.*
V.-C. BACON	J. B. DAVIDSON, F. G. A. WILLIAMS,	*Barristers-at-Law.*
C. J. BACON	A. W. T. DANIEL,	*Barrister-at-Law.*

Lord Hatherley,	*Lord Chancellor.*
Lord Romilly,	*Master of the Rolls.*
Sir William Milbourne James, Sir George Mellish,	*Lords Justices.*
Sir John Stuart, Sir Richard Malins, Sir James Bacon,	*Vice-Chancellors.*
Sir James Bacon,	*Chief Judge in Bankruptcy.*
Sir Robert Porrett Collier,	*Attorney-General.*
Sir John Duke Coleridge,	*Solicitor-General.*

ERRATA.

Page	*Line*	*For*	*Read*
117	8	*Culliver* v. *Ashby*	*Gulliver* v. *Wickett.*
„	Foot-note (1)	4 Burr. 1929	1 Wils. 105.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Adams, *In re. Ex parte* Birmingham Gaslight and Coke Company – – – – – 204
Albert Life Assurance Company, *In re. Ex parte* Western Life Assurance Society – – 164
Allen, *Ex parte. Ex parte* Page. *In re* Middleton – – – 209
Anderson *v.* Pignet – – – 329
Aston *v.* Meredith – – – 601
Attorney-General, Merchant Taylors' Company *v.* – – – 35
Attree *v.* Attree – – – 280

B.

Banks *v.* Goodfellow – – 472
Barlow, Bowen *v.* – – – 454
Barnaby *v.* Tassell – – – 363
Birmingham and Staffordshire Gaslight Company, *Ex parte. In re* Fanshaw and Yorston 615
Birmingham Gaslight and Coke Company, *Ex parte. In re* Adams – – – – 204
Bissell Brothers, *In re. Ex parte* Duignan and Others – – 604
Blower's Trusts, *In re* – – 97
Bowen *v.* Barlow – – – 454

PAGE

Bower *v.* Smith – – – 279
Braithwaite, Reed *v.* – – 514
Brampton and Longtown Railway Company, *In re* – – 428
British Mutual Life Assurance Society, Southall *v.* – – 65
Britton, Potts *v.* – – – 433
Brogden, Llynvi Company *v.* – 188
Bruce *v.* Bruce – – – 371

C.

Callanane *v.* Campbell – – 378
Campbell, Callanane *v.* – – 378
Cannon *v.* Johnson – – – 90
Cassavetti, Zambaco *v.* – – 439
Castle *v.* Fox – – – – 542
Chandler, Cocks *v.* – – – 446
Chorley, *Ex parte. In re* South Essex Estuary Company – 157
Clark *v.* Henry – – – 222
Cocks *v.* Chandler – – – 446
Colborne and Strawbridge, *Ex parte. In re* Imperial Land Company of Marseilles – – 478
Constantinople and Alexandria Hotel Company, *In re.* Reidpath's Case – – – – 86
Crédit Foncier of England, *In re* 356
Crystal Palace Railway Company, Earl St. Germans *v.* – 568

PAGE

Cunynghame's Settlement, *In re* 324
Curling *v.* Walters – – – 292

D.

Darnell *v.* Hunter – – – 292
De la Salle *v.* Moorat – – 8
Disderi & Co., *In re* – – 242
Duignan and Others, *Ex parte*. *In re* Bissell Brothers – – 604

E.

Eddel's Trusts, *In re* – – 559
Empire Assurance Corporation, *In re*. Leeke's Case – – 100
Evans, *Ex parte*. *In re* Marseilles Extension Railway and Land Company – – – – 151

F.

Fanshaw and Yorston, *In re*. *Ex parte* Birmingham and Staffordshire Gaslight Company – 615
Fox, Castle *v.* – – – 542
—— *v.* Fox – – – – 142

G.

Galliers *v.* Metropolitan Railway Company – – – – 410
Girdlestone *v.* North British Mercantile Insurance Company – 197
Good, Harrison *v.* – – – 338
Goodfellow, Banks *v.* – – 472

H.

Hall *v.* Hall – – – – 290
—— *v.* Hargreaves – – – 414
——, Harvey *v.* – – – 31
Hargreaves, Hall *v.* – – – 414
Harrison *v.* Good – – – 338
Harvey *v.* Hall – – – 31
Hawkes *v.* Hubback – – – 5
Heasman *v.* Pearse – – – 522
Henry, Clark *v.* – – – 222
Hepworth *v.* Hepworth – – 10
Hercules Insurance Company, *In re* – – – – 321

PAGE

Hill *v.* Lane – – – – 215
Hobgen *v.* Neale – – – 48
Holland *v.* Wood – – – 91
Hood *v.* North Eastern Railway Company – – – – 116
Hopgood *v.* Parkin – – – 74
Hubback, Hawkes *v.* – – – 5
Hunter, Darnell *v.* – – – 292
——— *v.* Walters – – – 292

I.

Imperial Land Company of Marseilles, *In re*. *Ex parte* Colborne and Strawbridge – – – 478
——————————— *In re*. *Ex parte* Jeaffreson – – 109
Ingham *v.* Waskett – – – 283
Ingle's Trusts, *In re* – – 578

J.

Jeaffreson, *Ex parte*. *In re* Imperial Land Company of Marseilles – – – – 109
Johnson, Cannon *v.* – – – 90
Joyce *v.* Rawlins – – – 53

K.

Kilmorey, Earl, Viscount Newry *v.* – – – – – 425
Kincaid's Case. *In re* North Kent Railway Extension Railway Company – – – 192
King's Cross Industrial Dwellings Company, *In re* – – 149

L.

Land and Sea Telegraph Company, Thames Plate Glass Company *v.* – – – – 248
Lane, Hill *v.* – – – – 215
Leather *v.* Simpson – – – 398
Leeke's Case. *In re* Empire Assurance Corporation – – 100
Levy & Co., *Ex parte*. *In re* Varbetian & Co. – – – 619
Lewes' Trusts, *In re* – – 236
Lightfoot, Menzies *v.* – – 459
Llynvi Company *v.* Brogden – 188

M.

PAGE

Maclaren *v.* Stainton – – 382
Marseilles Extension Railway and Land Company, *In re. Ex parte* Evans – – – 151
Menzies *v.* Lightfoot – – 459
Mercantile Trading Company, *In re.* Schroder's Case – 131
Merchant Taylors' Company *v.* Attorney-General – – 35
Meredith, Aston *v.* – – – 601
Metropolitan Railway Company, Galliers *v.* – – – – 410
Middleton, *In re. Ex parte* Allen. *Ex parte* Page – – – 209
Minet *v.* Morgan – – – 284
Moorat, De la Salle *v.* – – 8
Morgan, Minet *v.* – – – 284
Moseley's Trusts, *In re* – – 499

N.

Neale, Hobgen *v.* – – – 48
Nethersole *v.* School for the Indigent Blind – – – – 1
Newry (Viscount) *v.* Earl Kilmorey – – – – 425
Nicolls, Peter *v.* – – – 391
North British Mercantile Insurance Company, Girdlestone *v.* – – – – 197
North Eastern Railway Company, Hood *v.* – – – 116
North Kent Railway Extension Railway Company, *In re.* Kincaid's Case – – – – 192

O.

Oliver *v.* Oliver – – – 506
Open Stock Exchange, Tracy *v.* 556

P.

Page, *Ex parte. Ex parte* Adams. *In re* Middleton – – – 209
Parkin, Hopgood *v.* – – 74
Pearse, Heasman *v.* – – 522
Peter *v.* Nicolls – – – 391
Pignet, Anderson *v.* – – 329
Pilcher *v.* Rawlins – – – 53
Porter, Twynam *v.* – – – 181
Potts *v.* Britton – – – 433
Prichard *v.* Prichard – – 232

R.

Rawlins, Joyce *v.* – – – 53
———, Pilcher *v.* – – – 53
Rector of Liverpool, *Ex parte* – 15
——— St. Martin's, Birmingham, *Ex parte* – – – 23
Reed *v.* Braithwaite – – 514
Reidpath's Case. *In re* Constantinople and Alexandria Hotel Company – – – – 86
Roper-Curzon *v.* Roper-Curzon – 452
Ryves *v.* Ryves – – – 539

S.

St. Germans (Earl) *v.* Crystal Palace Railway Company – 568
Sanger *v.* Sanger – – – 470
Savage *v.* Snell – – – 264
School for the Indigent Blind, Nethersole *v.* – – – 1
Schroder's Case. *In re* Mercantile Trading Company – – 131
Seaton *v.* Twyford – – – 591
Sewell's Estate, *In re* – – 80
Simpson, Leather *v.* – – 398
Skottowe *v.* Young – – – 474
Smirthwaite's Trusts, *In re* – 251
Smith, Bower *v.* – – – 279
Snell, Savage *v.* – – – 264
South Essex Estuary Company, *In re. Ex parte* Chorley – 157
Southall *v.* British Mutual Life Assurance Society – – 65
Southampton Dock Company *v.* Southampton Harbour and Pier Board – – – – 254
Southampton Harbour and Pier Board, Southampton Dock Company *v.* – – – 254
Spittle *v.* Walton – – – 420
Stainton, Maclaren *v.* – – 382

T.

Tassell, Barnaby *v.* – – – 363
Teall *v.* Watts – – – 213

	PAGE
Thames Plate Glass Company *v.* Land and Sea Telegraph Company	248
Thomson's Trusts, *In re*	146
Tracy *v.* Open Stock Exchange	556
Twyford, Seaton *v.*	591
Twynam *v.* Porter	181
Tyler *v.* Yates	265

V.

Varbetian & Co., *In re.* *Ex parte* Levy & Co.	619

W.

Walters, Curling *v.*	292
———, Hunter *v.*	292
Walton, Spittle *v.*	420
Waskett, Ingham *v.*	283
Watts, Teall *v.*	213
Westbrook's Trusts, *In re*	252
Western Life Assurance Society, *Ex parte.* *In re* Albert Life Assurance Company	164
Widdow's Trusts, *In re*	408
Wood, Holland *v.*	91
Wood's Trusts, *In re*	155

Y.

Yates, Tyler *v.*	265
Young, Skottowe *v.*	474

Z.

Zambaco *v.* Cassavetti	439

TABLE OF CASES CITED.

A.

		PAGE
Aberaman Ironworks *v.* Wickens	Law Rep. 5 Eq. 485	485
Abercorn's (Marquis of) Case	4 D. F. & J. 78	104, 194, 245
Agar *v.* Fairfax	17 Ves. 533	90
—— *v.* Regent's Canal Company	Coop. G. 77	121
Allen *v.* Knight	5 Hare, 272; 11 Jur. 527	302
Andrews *v.* Cawthorne	Willes, 536	17
Anglo-Italian Bank and De Rosaz, In re	Law Rep. 2 Q. B. 452	70
Anstice, In re	23 Beav. 135	224
Archer *v.* Jegon	8 Sim. 446	528
Armitage *v.* Coates	35 Beav. 1	325
Ashpitel *v.* Bryan	3 B. & S. 474	402
Aslatt *v.* Farquharson	10 W. R. 458	483
Aspinall *v.* Petvin	1 S. & S. 544	93
Athenæum Life Assurance Society *v.* Pooley	1 Giff. 102; 3 De G. & J. 294	161, 483
Attorney-General *v.* Corporation of Beverley	6 D. M. & G. 256	40
—— *v.* Dean and Canons of Windsor	8 H. L. C. 369.	42
—— *v.* Fitz-John	2 H. & N. 465.	381
—— *v.* Leeds Corporation	Law Rep. 5 Ch. 583	120
—— *v.* Malim	You. 376	422
—— *v.* Mayor of Bristol	2 Jac. & W. 294	42
—— *v.* Shore	1 My. & Cr. 394	429
—— *v.* Wax Chandlers' Company	Law Rep. 8 Eq. 452; Ibid. 5 Ch. 503	39
—— *v.* West Hartlepool Improvement Commissioners	Law Rep. 10 Eq. 152	121

B.

Badart's Trusts, In re	Law Rep. 10 Eq. 288	380
Baglan Hall Colliery Company, In re	Law Rep. 5 Ch. 352	134
Bailey *v.* Birchall	2 H. & M. 371.	185
Bamford *v.* Turnley	3 B. & S. 62	346
Banks *v.* Goodfellow	Law Rep. 5 Q. B. 549	423
Barker *v.* Barker	5 De G. & Sm. 753	528
Barnard, In re	2 D. M. & G. 359	153
—— *v.* Hunter	2 Jur. (N.S.) 1213	300

		PAGE
Basset *v.* Nosworthy	2 Wh. & T. L. C. 1, 3rd Ed.	59
Bateman *v.* Gray	29 Beav. 447	527
Bates *v.* Johnson	Joh. 304	57
Bayliffe *v.* Butterworth	1 Ex. 425	463
Beasney's Trusts, In re	Law Rep. 7 Eq. 498	238
Bebb *v.* Penoyre	11 East, 160	281
Bective (Countess of) *v.* Hodgson	10 H. L. C. 656	563
Belchier, Ex parte	Amb. 218	77
Benham's Trusts, In re	Law Rep. 4 Eq. 416; Ibid. 5 Ch. 141, n.	238
Bennett *v.* Chudleigh	2 Y. & C. Ch. 164	291
——— *v.* Marshall	2 K. & J. 740	584
Benson *v.* Benson	6 Sim. 126	6
Benyon *v.* Fitch	35 Beav. 570	274
Bernasconi *v.* Atkinson	10 Hare, 345	585
Berrie *v.* Howitt	Law Rep. 9 Eq. 1	186
Beverley (Mayor of) *v.* Attorney-General	6 H. L. C. 310	41
Bignold, Ex parte	3 Deac. 151; 3 M. & A. 477	597
Billage *v.* Southee	9 Hare, 534	597
Bird *v.* Bass	6 Man. & G. 143	608
—— *v.* Hustler	1 Russ. & My. 325	426
Birtwhistle *v.* Vardill	7 Cl. & F. 895	476
Bissell, In re	Law Rep. 11 Eq. 604	617
Blackamore's Case	Co. Rep. 8, 156, a.	617
Blackburn *v.* Stace	6 Madd. 69	575
Blackwell *v.* Crabb	36 L. J. (Ch.) 504	449
Blair *v.* Bromley	5 Hare, 542; 2 Ph. 354	219
Bland *v.* Williams	3 My. & K. 411	146
Bolitho *v.* Hillyar	34 Beav. 180	334
Bolton *v.* Corporation of Liverpool	3 Sim. 467	285
Bone *v.* Pollard	24 Beav. 283	12
Bovill *v.* Smith	Law Rep. 2 Eq. 459	201
Bowden *v.* Henderson	2 Sm. & Giff. 360	238
Bowers *v.* Bowers	Law Rep. 8 Eq. 283; Ibid. 5 Ch. 244	224
Bowes *v.* Hope Mutual Insurance Company	11 H. L. C. 389	150
Boys *v.* Bedale	1 H. & M. 798	476
Bradshaw *v.* Bradshaw	2 Y. & C. Ex. 72	584
Braham *v.* Bustard	1 H. & M. 447	448
Bree *v.* Perfect	1 Coll. 128	146
Bridge *v.* Yates	12 Sim. 645	527
Briggs *v.* Jones	Law Rep. 10 Eq. 92	308
Bristow *v.* Bristow	5 Beav. 289	584
Bronsdon *v.* Winter	Amb. 56	509
Brown *v.* Brown	Law Rep. 7 Eq. 185	129
Browne *v.* Browne	3 Sm. & Giff. 568	563
——— *v.* Freeman	12 W. R. 305	449
Brownsword *v.* Edwards	2 Ves. Sen. 243	147, 515
Buckle *v.* Mitchell	18 Ves. 100	394
Bull *v.* Pritchard	5 Hare, 567	563
Burnell *v.* Brown	1 Jac. & W. 168	412
Burrowes *v.* Lock	10 Ves. 470	218
——— *v.* Molloy	8 Ir. Eq. Rep. 482; 2 J. & Lat. 521	597
Butler *v.* Stratton	3 Bro. C. C. 367	367

C.

		PAGE
Cadge, In the Goods of Ann	Law Rep. 1 P. & D. 543	368
Cain *v.* Teare	4 Moo. P. C. 249	529
Campbell *v.* Brownrigg	1 Ph. 301	224
Capdeveille, In re	2 H. & C. 985	381
Capel *v.* Girdler	9 Ves. 509	335
Careless *v.* Careless	1 Mer. 384	584
Carter *v.* Carter	3 K. & J. 617	57
Cartwright *v.* Cartwright	1 Phillim. 90	423
Cartwright's Trusts, Re	8 W. R. 492	253
Carver *v.* Beaver	29 Beav. 449, n.	527
—— *v.* Bowles	2 Russ. & My. 301	326
Case *v.* Drosier	2 Keen, 764	534
Catlin *v.* Brown	11 Hare, 372	501
Catton *v.* Wyld	32 Beav. 266	576
Cavey *v.* Leadbitter	13 C. B. (N.S.) 470	346
Chapman *v.* Gibson	3 Bro. C. C. 229	375
Chaworth *v.* Beech	4 Ves. 555	509
Cheney *v.* Hall	Amb. 526	373
Chesterfield *v.* Janssen	1 Wh. & T. L. C., 3rd Ed. 483	275
Chichester *v.* Coventry	Law Rep. 2 H. L. 71	145
Child *v.* Douglas	Kay, 560; 2 Jur. (N.S.) 950; 5 D. M. & G. 739	347
City Bank, Ex parte	Law Rep. 3 Ch. 758	482
Clarke *v.* Dickson	E. B. & E. 148	219
—— *v.* Royle	3 Sim. 499	179
Clifford *v.* Beaumont	4 Russ. 325	147
Clinch *v.* Financial Corporation	Law Rep. 4 Ch. 117	69
Clogstoun *v.* Walcott	13 Sim. 523	375
Clough *v.* Bond	3 My. & Cr. 490	77
Coates *v.* Clarence Railway Company	1 Russ. & My. 181	126
Coe *v.* Briggs	1 N. R. 536	527
Cole *v.* Scott	1 Mac. & G. 518	546
Collins *v.* Collins	31 Beav. 346	172
Colman *v.* Turner	Law Rep. 10 Eq. 230	9
Colt *v.* Wollaston	2 P. Wms. 155	218
Colyer *v.* Colyer	Law Rep. 1 Ch. 482	283
—— *v.* Finch	5 H. L. C. 905	361
Combe *v.* Corporation of London	1 Y. & C. Ch. 631	288
Const *v.* Harris	T. & R. 496	69
Conway *v.* Nall	1 C. B. 643	607
Cooper *v.* Martin	Law Rep. 3 Ch. 47	436
Cork and Youghal Railway Company, In re	Law Rep. 4 Ch. 748	113
Cory *v.* Eyre	1 D. J. & S. 149	301
Coutourier *v.* Hastie	5 H. L. C. 673	400
Coventry *v.* Coventry	2 Dr. & Sm. 470	527
Cox *v.* Bennett	Law Rep. 6 Eq. 422	545
—— *v.* Cox	Law Rep. 8 Eq. 343	385
Crause *v.* Cooper	1 J. & H. 207	530
Cresswell *v.* Crisp	2 C. & M. 634	483
Cridland *v.* Lord De Mauley	1 De G. & Sm. 459	219
Croft *v.* Graham	2 D. J. & S. 155; 5 Giff. 1	273
Crook *v.* Whitley	7 D. M. & G. 490	98
Currie, Ex parte	32 L. J. (Ch.) 421; 11 W. R. 46	244
Curriers Company *v.* Corbet	2 Dr. & Sm. 355	576
Currie's Case	3 D. J. & S. 367	104, 194
Cuthbert *v.* Cumming	11 Ex. 405	463

D.

		PAGE
Daking *v.* Whimper	26 Beav. 568	395
Daniel *v.* Russell	14 Ves. 393	210
Daniels *v.* Davison	16 Ves. 249; 17 Ves. 433	259
Daun *v.* City of London Brewery Company	Law Rep. 8 Eq. 155	462
Davenport *v.* Coltman	12 Sim. 588	282
——— *v.* Hanbury	3 Ves. 257	50, 94
——— *v.* Hinchcliffe	1 J. & H. 713	145
Davis *v.* Lowndes	3 C. B. 808	185
Daw *v.* Eley	2 H. & M. 725	201
Dawes' Case	Law Rep. 6 Eq. 232	499
Deane *v.* Test	9 Ves. 146	510
Dearle *v.* Hall	3 Russ. 1	211
De Biel *v.* Thomson	3 Beav. 469	400
Dickinson *v.* Mort	8 Hare, 178	326
Dixon *v.* Astley	1 Mer. 133	575
—— *v.* Gayfere	1 De G. & J. 655	172
Dodds *v.* Hills	2 H. & M. 424	60
Doe *v.* Allen	12 A. & E. 451	584
—— *v.* Cafe	7 Ex. 675	564
—— *v.* Earles	15 M. & W. 450	365
—— *v.* Hiscocks	5 M. & W. 363	584
—— *v.* Jessep	12 East, 288	516
—— *v.* Jones	18 L. J. (Q.B.) 260	333
—— *v.* Keeling	1 M. & S. 95	346
—— *v.* Martyr	1 B. & P. (N.R.) 332	307
—— *v.* Nepean	5 B. & Ad. 86; 2 M. & W. 894	238
—— *v.* Rucastle	8 C. B. 876	93
—— *v.* Thomson	12 Moo. P. C. 116	93
—— *v.* Walker	12 M. & W. 591	545
Don's Estate, In re	4 Drew. 194	476
Douglas *v.* Douglas	Kay, 400	546
Dowle *v.* Saunders	2 H. & M. 242	308
Dowley *v.* Winfield	14 Sim. 277	238
Dowson *v.* Gascoin	2 Keen, 14	235
Drake *v.* Drake	8 H. L. C. 172	585
——— *v.* Symes	2 D. F. & J. 81	426
Drant *v.* Vause	1 Y. & C. Ch. 580	456
Drew *v.* Killick	1 De G. & Sm. 266	93
Drummond's Case	Law Rep. 4 Ch. 772	107, 134
Du Hourmelin *v.* Sheldon	4 My. & Cr. 525	476
Duncan *v.* Topham	8 C. B. 225	87
Dunlop *v.* Higgins	1 H. L. C. 381	87
Dunn *v.* Snowden	2 Dr. & Sm. 201	238

E.

East Gloucestershire Railway Company *v.* Bartholomew	Law Rep. 3 Ex. 15	194
East of England Banking Company, In re	Law Rep. 4 Ch. 14	497
Eaves *v.* Hickson	30 Beav. 136	77
Ebbetts' Case	Law Rep. 5 Ch. 302	87
Ebbw Vale Company's Case	Law Rep. 5 Ch. 112	496
Eccard *v.* Brooke	2 Cox, 213	94

		PAGE
Edwards *v.* Brown	1 C. & J. 307	305
——— *v.* Edwards	15 Beav. 357	224
——— *v.* Gabriel	30 L. J. (Ex.) 245; 31 Ibid. (Ex.) 113	206
——— *v.* Martin	25 L. J. (Ch.) 284	597
——— *v.* Scarsbrook	32 L. J. (Q.B.) 45; 3 B. & S. 280	206, 606
——— *v.* Tuck	23 Beav. 272	408
Elie *v.* Osborne	2 Vern. 574; 1 P. Wms. 387	563
Elliott *v.* Elliott	2 Cas. C. 231	11
——— *v.* Fisher	12 Sim. 505	457
Emuss *v.* Smith	2 De G. & Sm. 722	456, 546
English Joint Stock Bank, In re	Law Rep. 3 Eq. 203	430
European Bank, In re	Law Rep. 5 Ch. 358	483
Evans *v.* Bicknell	6 Ves. 174	218, 302
Eyre *v.* Burmester	10 H. L. C. 90	307

F.

Farthing *v.* Allen	2 Madd. 310	225
Festing *v.* Allen	12 M. & W. 279	563
Fisher *v.* Fisher	2 Keen, 610	540
Fitzhenry *v.* Bonner	2 Drew. 36	147
Fitzherbert *v.* Mather	1 T. R. 12	306
Flight *v.* Reed	9 Jur. (N.S.) 1016	274
Fluker *v.* Taylor	3 Drew. 183	258
Foley *v.* Hill	2 H. L. C. 28	258
Forbes and Judd's Case	Law Rep. 5 Ch. 270	108
——— *v.* Moffatt	18 Ves. 384	333
Foster *v.* Mackinnon	Law Rep. 4 C. P. 704	304
Frazer *v.* Jones	5 Hare, 475	302
Freeman *v.* Pennington	3 D. F. & J. 295	283
Fry *v.* Capper	Kay, 163	326

G.

Gaffee, In re	1 Mac. & G. 541	5
Gardner *v.* Hatton	6 Sim. 93	508
Garrard *v.* Tuck	18 L. J. (C.P.) 338	334
Garrett *v.* Wilkinson	2 De G. & Sm. 244	12
Gaskell *v.* Holmes	3 Hare, 438	529
Gauntlett *v.* Whitworth	2 C. & K. 720	346
Gedge, In re	14 Beav. 56	152
General Estates Company, In re	Law Rep. 3 Ch. 758	160
Gibson *v.* Clarke	1 Ves. & B. 500	575
Girdlestone *v.* Doe	2 Sim. 225	95
Gompertz *v.* Bartlett	2 E. & E. 849	400
Goodlad *v.* Burnett	1 K. & J. 341	545
Gordon *v.* Cheltenham and Great Western Railway Company	2 Railw. Cas. 800	120
——— *v.* Graham	2 Eq. Cas. Abr. 18	464
Gosset's Settlement, In re	19 Beav. 529	453
Gough *v.* Botevel	1 Dick. 396	473
——— *v.* Jones	11 W. R. 107	27
Grant *v.* Grant	Law Rep. 5 C. P. 380	584

		PAGE
Graves *v.* Legg	2 H. & N. 210	463
Gray *v.* Lewis	Law Rep. 8 Eq. 526	245
Green *v.* Barrett	1 Sim. 45	219
—— *v.* Horne	1 Salk. 197	486
Green's Settlement, In re	Law Rep. 1 Eq. 288	238
Greenwich Hospital Improvement Act, Re	20 Beav. 458	281
Gregory *v.* Patchett	33 Beav. 595	69
Gregory's Settlement, In re	34 Beav. 600	584
Grey *v.* Grey	2 Sw. 594	12
—— *v.* Pearson	6 H. L. C. 61	147, 515
Gulliver *v.* Ashby.	4 Burr. 1929	147
Gunn's Case	Law Rep. 3 Ch. 40	87
Gunson *v.* Simpson	Law Rep. 5 Eq. 332	252
Gunter *v.* Gunter	23 Beav. 571	333
Gurney *v.* Womersley	4 E. & B. 133	400
Gwynn, In re	Law Rep. 10 Eq. 419	205

H.

Habergham *v.* Ridehalgh	Law Rep. 9 Eq. 395	368, 530
Halford *v.* Cameron's Coalbrook Steam Coal, &c., Company	16 Q. B. 442	486
Hallifax *v.* Wilson	16 Ves. 168	224
Hanbury *v.* Cockerell	Fearne's Cont. Rem. 395	225
Hannam *v.* Sims	2 De G. & J. 151	367
Harcourt *v.* Harcourt	26 L. J. (Ch.) 536	530
Harrison, Ex parte	26 L. J. (Bkcy.) 30	606
Harrison's Estate, In re	Law Rep. 5 Ch. 408	95
Hart *v.* Tulk	2 D. M. & G. 300	148
Hartopp *v.* Lord Carbery	Saunders on Uses, 197	534
Hatch *v.* Trayes	11 A. & E. 702	483
Hayden *v.* Kirkpatrick	34 Beav. 645	334
Haynes *v.* Haynes	1 Dr. & Sm. 426	195
Hervey *v.* Hervey	1 Atk. 561	374
Hetherington *v.* Oakman	2 Y. & C. Ch. 299	529
Hewitson *v.* Sherwin	Law Rep. 10 Eq. 53	33
Hewitt *v.* Loosemore	9 Hare, 449	308
Higgs *v.* Northern Assam Tea Company	Law Rep. 4 Ex. 387	160, 484
Hill *v.* Lane	Law Rep. 11 Eq. 215	401
Hilton *v.* Woods	Law Rep. 4 Eq. 432	191
Hindley *v.* Emery	Law Rep. 1 Eq. 52	575
Hitchcock *v.* Giddings	4 Price, 135	400
Hobson *v.* Shearwood	15 W. R. 887	283
Hodges *v.* Grant	Law Rep. 4 Eq. 140	530
Hodgson *v.* Lord Bective	1 H. & M. 376	563
Hodgson's Trusts, In re	1 K. & J. 178	50, 528
Hole *v.* Barlow	4 C. B. (N.S.) 334	349
Holmes *v.* Prescott	12 W. R. 636	563
Home *v.* Pillans	2 My. & K. 15	223
—— *v.* Watson	2 Sim. 85	32
Hood *v.* North Eastern Railway Company	Law Rep. 5 Ch. 525	120
Hope *v.* Meek	25 L. J. (Ex.) 11	608
Hopkinson *v.* Rolt	9 H. L. C. 514	462
Hornby's Case	16 W. R. 1164	499
Horridge *v.* Ferguson	Jac. 583	94
Hotchkiss's Trusts, In re	Law Rep. 8 Eq. 643	530
Houstoun *v.* Houstoun	4 Sim. 611	527

		PAGE
Howard *v.* Collins	Law Rep. 5 Eq. 349	529
Howe *v.* Earl of Dartmouth	7 Ves. 137	82
Hughes *v.* Hosking	11 Moo. P. C. 1	546
——— *v.* Kearney	1 Sch. & Lef. 132	176
Hulett's Case	2 J. & H. 306	162, 484
Humfrey *v.* Dale	7 E. & B. 266	463
Hunt *v.* Elmes	2 D. F. & J. 578	301
——— *v.* Peake	Joh. 705	191
Hurry *v.* Hurry	Law Rep. 10 Eq. 346	214, 603
Hutchinson *v.* Barron	9 W. R. 538	546
Hutton *v.* Scarborough Cliff Hotel Company	2 Dr. & Sm. 514	69
——— *v.* Simpson	2 Vern. 722	516
——— *v.* Warren	1 M. & W. 466	463
Huxtep *v.* Brooman	1 Bro. C. C. 437	281
Hythe (Corporation of) *v.* East	Law Rep. 1 Eq. 620	576

I.

Imperial Bank of China, India, and Japan, In re	Law Rep. 1 Ch. 339	70
——— *v.* Bank of Hindustan, China, and Japan	Law Rep. 6 Eq. 91	70
Imperial Mercantile Credit Association *v.* Witham	Law Rep. 3 Eq. 89	249
Inchbald *v.* Robinson	Law Rep. 4 Ch. 388	346
Ingram *v.* Suckling	7 W. R. 386	146
——— *v.* Thorp	7 Hare, 67	219
Ive *v.* King	16 Beav. 46	49

J.

James, Re	4 De G. & Sm. 183	152
——— *v.* Smith	14 Sim. 214	99
Jee *v.* Audley	1 Cox, 324	534
Jenny *v.* Andrews	6 Madd. 264	436
Jersey (Earl of) *v.* Briton Ferry Floating Dock Company	Law Rep. 7 Eq. 409	172
Jesson *v.* Wright	2 Bli. 1	93
Johnson *v.* Gardiner	1 Dick. 313	473
——— *v.* Legard	T. & R. 281	395
Jones *v.* Lewis	2 Ves. Sen. 240	77
——— *v.* Powles	3 My. & K. 581	59
——— *v.* Smith	1 Hare, 43	308
Jordan's Trusts, In re	2 N. R. 57; 8 L. T. (N.S.) 307	367

K.

Kavanagh *v.* Morland	Kay, 16	93
Kearns *v.* Leaf	1 H. & M. 681	69, 175
Keates *v.* Lyon	Law Rep. 4 Ch. 218	349
Kelson *v.* Kelson	9 Hare, App. lxxxvi.	396
Kemp *v.* Sober	1 Sim. (N.S.) 517	346

		PAGE
Kennedy *v.* Green	3 My. & K. 699	303
Key *v.* Key	4 D. M. & G. 73	148
Kidwelly Canal Company *v.* Raby	2 Price, 93	194
Kingsford *v.* Merry	11 Ex. 577	307
Kirby *v.* Potter	4 Ves. 748	508
Knight *v.* Knight	6 Sim. 121	6
Knott, Ex parte	11 Ves. 609	57

L.

Lambe *v.* Orton	6 Jur. (N.S) 61; 8 W. R. 111	238
Langdale (Lady) *v.* Briggs	8 D. M. & G. 391	544
Langmead's Trusts, In re	20 Beav. 20	172
Langston *v.* Langston	2 Cl. & F. 194	148
Lanphier *v.* Buck	2 Dr. & Sm. 484	527
Law *v.* Indisputable Life Policy Company	1 K. & J. 223	69
Layard *v.* Maud	Law Rep. 4 Eq. 397	301
Leach *v.* Leach	2 Y. & C. Ch. 495	368
Leake *v.* Robinson	2 Mer. 363	504, 563
Lee *v.* Angas	15 W. R. 119	303
—— *v.* Lockhart	3 My. & Cr. 302	334
Le Grice *v.* Finch	3 Mer. 50	509
Leifchild's Case	Law Rep. 1 Eq. 231	134
Leigh *v.* Norbury	13 Ves. 340	94
Lett *v.* Parry	1 H. & M. 517	285
Levita's Case	Law Rep. 3 Ch. 36	104
——— (G. H.) Case	Law Rep. 5 Ch. 489	104, 248
Lewis *v.* Puxley	16 M. & W. 733	93
Lickbarrow *v.* Mason	1 Sm. L. C. 699	173
Lilford (Lord) *v.* Powys Keck	30 Beav. 300	552
Lindo *v.* Lindo	1 Beav. 496	304
Llewellyn's Trust, Re	29 Beav. 171	83
Lloyd *v.* Attwood	3 De G. & J. 614	305
——— *v.* Cocker	27 Beav. 645	453
Lord's Estate, In re	Law Rep. 2 Eq. 605	430
Lovelace's Settlement, In re	4 De G. & J. 340	381
Lowe *v.* Thomas	5 D. M. & G. 315	233
Lugar *v.* Harman	1 Cox. 250	586
Luxford *v.* Cheeke	3 Lev. 125	516
Luxton *v.* Stephens	3 P. Wms. 373	473
Lynch *v.* Dunsford	14 East, 494	306
Lyon *v.* Coward	15 Sim. 287	530

M.

M'Garel *v.* Moon	Law Rep 10 Eq. 22	200
M'Gregor *v.* M'Gregor	1 D. F. & J. 63	50, 528
McIvor's Claim	Law Rep. 5 Ch. 424	176
Mackreth *v.* Symmons	15 Ves. 329	300
Maclaren *v.* Stainton	3 D. F. & J. 202	144
Maddock *v.* Legg	25 Beav. 531	50
Malcolm *v.* O'Callaghan	2 Madd. 349	147
Mallock *v.* Still	15 W. R. 293	283
Mann *v.* Stephens	15 Sim. 377	346
Manning *v.* Purcell	2 Sm. & Giff. 284; 7 D. M. & G. 55	233
Manningford *v.* Toleman	1 Coll. 670	301

		PAGE
Manser *v.* Eastern Counties Railway Company	2 Railw. Cas. 380	126
Marjoribanks *v.* Hovenden	Dru. 11	306
Marlborough Club Company, In re	Law Rep. 5 Eq. 365	134
Marsh *v.* Keith	1 Dr. & Sm. 342	200
Martin *v.* Holgate	Law Rep. 1 H. L. 175	527
——— *v.* Porter	5 M. & W. 351	190
——— *v.* Powning	Law Rep. 4 Ch. 356	123
Martinez *v.* Cooper	2 Russ. 198	308
Massey *v.* Banner	1 Jac. & W. 241	77
——— *v.* Massey	2 J. & H. 728	443
Mathews *v.* Mathews	Law Rep. 4 Eq. 278	545
Matthew *v.* Bowler	6 Hare, 110	173
Maude *v.* Maude	22 Beav. 290	94
——— *v.* ———	5 De G. & Sm. 418	253
Maundrell *v.* Maundrell	7 Ves. 567; 10 Ves. 246	57, 335
Maynard *v.* Wright	26 Beav. 285	527
Merrick's Trusts, In re	Law Rep. 1 Eq. 551	530
Midland Railway Company, In re	34 Beav. 525	545
Migotti's Case	Law Rep. 4 Eq. 238	104, 135
Miles *v.* Miles	Law Rep. 1 Eq. 462	545
Miller *v.* Cook	Law Rep. 10 Eq. 641	274
Minton *v.* Kirwood	Law Rep. 3 Ch. 614	527
Mole *v.* Smith	1 Jac. & W. 665	335
Monk *v.* Sharp	2 H. & N. 540	606
Monteith *v.* Nicholson	2 Keen, 719	224
Moor *v.* Raisbeck	12 Sim. 123	457
Moore *v.* Morris	4 Drew. 33	6
Morgan *v.* Morgan	14 Beav. 72	83
——— *v.* Powell	3 Q. B. 278	190
Morland *v.* Pellatt	8 B. & C. 722	607
Mortimer *v.* Hartley	3 De G. & Sm. 330, n.	515
Moxon *v.* Bright	Law Rep. 4 Ch. 292	258
Munro *v.* Munro	7 Cl. & F. 842	476

N.

Natal Investment Company, In re	Law Rep. 3 Ch. 355	161, 482
Natusch *v.* Irving	1 Lind. on Part. 605	69
Neve *v.* Pennell	1 H. & M. 252	417
Newman *v.* Newman	26 Beav. 220	365
——— *v.* ———	10 Sim. 51	563
Newton *v.* Chorlton	10 Hare, 646	173
——— *v.* Newton	Law Rep. 4 Ch. 143	301
New Zealand Banking Corporation, In re	Law Rep. 3 Ch. 154	482
Noel *v.* Noel	1 D. J. & S. 468	285
North British Mercantile Assurance Company *v.* Burke	17 W. R. 22	283
Northumberland and Durham District Banking Company, Re	2 De G. & J. 357	322
Norton, In re	Law Rep. 10 Eq. 425	205

O.

Oakes and Peek, Ex parte	Law Rep. 3 Eq. 576; 2 H. L. 325	Ibid. 115, 308
Ogilvie *v.* Currie	37 L. J. (Ch.) 541	218

		PAGE
Ogilvie *v.* Jeaffreson	2 Giff. 353	303
O'Mahony *v.* Dickson	2 Sch. & Lef. 400	258
Ord *v.* Ord	Law Rep. 2 Eq. 393	527
Orgill's Case	21 L. T. (N.S.) 221	244
Orton's Trusts, In re	Law Rep. 3 Eq. 375	528
Owen *v.* Owen	2 H. & C. 88	333

P.

Palmer *v.* Flower	18 W. R. 887	264
Parrott *v.* Sweetland	3 My. & K. 655	179
Parsons *v.* Lloyd	Law Rep. 1 Ex. 307, n.	206, 607
Partington *v.* Reynolds	4 Drew. 253	443
Pascall *v.* Scott	1 Ph. 110	417
Peacock *v.* Peacock	13 W. R. 516	540
Pearsall *v.* Simpson	15 Ves. 29	516
Pearson *v.* Stephen	5 Bli. (N.S.) 204	95
Pease *v.* Jackson	Law Rep. 3 Ch. 576	57
Pellatt's Case	Law Rep. 2 Ch. 527	104
Pell's Case	Law Rep. 5 Ch. 11	104, 134
Penny *v.* Clarke	1 D. F. & J. 425	528
Perceval *v.* Perceval	Law Rep. 9 Eq. 386	563
Perry *v.* Woods	3 Ves. 204	530
Perry-Herrick *v.* Attwood	2 De G. & J. 21	310
Peters *v.* Bacon	Law Rep. 8 Eq. 125	213
Peto *v.* Peto	16 Sim. 590	334
—— *v.* Reynolds	9 Ex. 410	486
Phené's Trusts, In re	Law Rep. 5 Ch. 139	238
Phillips *v.* Gutteridge	4 De G. & J. 531	334
——— *v.* Phillips	9 Hare, 471	258
Phœnix Life Policy Company, In re	2 J. & H. 441	69
Pike *v.* Stephens	17 L. J. (Q.B.) 282	608
Pilkington *v.* Himsworth	1 Y. & C. Ex. 612	422
Plumb *v.* Flewitt	2 Anst. 438	305
Polhill *v.* Walter	3 B. & Ad. 114	400
Pope *v.* Great Eastern Railway Company	Law Rep. 3 Eq. 171	575
Porter's Trust, In re	4 K. & J. 188	95
Potter's Trusts, In re	Law Rep. 8 Eq. 52	528
Powell *v.* Aiken	4 K. & J. 343	191
Prosser *v.* Rice	28 Beav. 68	57
Proudfoot *v.* Montefiore	Law Rep. 2 Q. B. 511	306
Pulvertoft *v.* Pulvertoft	18 Ves. 84	394

R.

Ramsey *v.* Eaton	10 M. & W. 22	608
Ramshire *v.* Bolton	Law Rep. 8 Eq. 294	219, 401
Raphael *v.* Thames Valley Railway Company	Law Rep. 2 Ch. 147	121
Rector of Liverpool, Ex parte	Law Rep. 11 Eq. 15	25
Reg. *v.* Abney	23 L. J. (M.C.) 154	26
—— *v.* Hill	20 L. J. (M.C.) 222; 2 Den. C. C. 254	422
—— *v.* Parish of St. Michael, Southampton	6 E. & B. 807	259

		PAGE
Reg. *v.* Randall	Russ. C. C. 185	485
Rex *v.* Carpenter	6 A. & E. 794	259
—— *v.* Crisp	1 B. & A. 282	617
—— *v.* Inhabitants of Ringstead	9 B. & C. 218	93
—— *v.* Moore	3 B. & Ad. 184	347
—— *v.* Richards	1 Russ. & Ry. 193	485
Rice *v.* Rice	2 Drew. 73	300
Richards *v.* James	Law Rep. 2 Q. B. 285	211
——— *v.* Richards	Joh. 754	333
Richardson *v.* Spraag	1 P. Wms. 434	94
Ricketts *v.* Loftus	4 Y. & C. Ex. 519	453
Riley *v.* Garnett	3 De G. & Sm. 629	563
River Dun Navigation Company *v.* North Midland Railway Company	1 Railw. Cas. 135	121
Roberts *v.* Croft	2 De G. & J. 1	302
Robinson *v.* Governors of London Hospital	10 Hare, 19	2
——— *v.* Reynolds	2 Q. B. 196	400
——— *v.* Sykes	23 Beav. 40	50, 530
Robinson's Case	Law Rep. 4 Ch. 330	87
Roddy *v.* Fitzgerald	6 H. L. C. 823	93
Ross *v.* Ross	2 Coll. 269	527
Rossiter *v.* Trafalgar Life Assurance Association	27 Beav. 377	200
Ruck *v.* Barwise	2 Dr. & Sm. 510	530
Ryall *v.* Hannam	10 Beav. 537	584

S.

St. Albyn *v.* Harding	27 Beav. 11	275
St. Aubyn *v.* Smart	Law Rep. 5 Eq. 183	219
St. Pancras Burial Ground, In re	Law Rep. 3 Eq. 173	16, 25
Sanderson *v.* Collman	4 Man. & G. 209	402
Sayer's Trusts, In re	Law Rep. 6 Eq. 319	534
Sayre *v.* Hughes	Law Rep. 5 Eq. 376	11
Scaife *v.* Scaife	4 Russ. 309	472
Scarsdale (Lord) *v.* Curzon	1 J. & H. 40	529
Scholefield *v.* Lockwood	Law Rep. 7 Eq. 83	185
Seal *v.* Brownton	3 Bro. C. C. 214	473
Seaman *v.* Wood	22 Beav. 591	501
Seccombe *v.* Edwards	28 Beav. 440	517
Sewell's Estate, In re	Law Rep. 11 Eq. 80	443
Shailer *v.* Groves	6 Hare, 162	95
Sharples *v.* Adams	32 Beav. 213	57
Shaw *v.* Gould	Law Rep. 3 H. L. 55	476
—— *v.* Johnston	1 Dr. & Sm. 412; 7 Jur. (N.S.) 1005	333
—— *v.* Neale	6 H. L. C. 581	185, 463
Shelley *v.* Bryer	Jac. 207	98
Shepperdson *v.* Dale	12 Jur. (N.S.) 156	530
Sibley *v.* Perry	7 Ves. 522	527
Sidmouth *v.* Sidmouth	2 Beav. 447	11
Silver *v.* Udall	Law Rep. 9 Eq. 227	214, 603
Simpson *v.* Denison	10 Hare, 51	69
Skinner, In re	Law Rep. 10 Eq. 432	205
Slim *v.* Croucher	2 Giff. 37; 1 D. F. & J. 518	218, 400
Slingsby *v.* Grainger	7 H. L. C. 273	528
Smith *v.* Baker	1 Atk. 385	375

		PAGE
Smith *v.* Garland	2 Mer. 123	394
—— *v.* Leveaux	2 D. J. & S. 1	258
—— *v.* Lidiard	3 K. & J. 252	99
—— *v.* Wilson	3 B. & Ad. 728	463
Smith's Trusts, In re	Law Rep. 9 Eq. 374	156
——	12 W. R. 933	380
Sneed *v.* Sneed	Amb. 64	374
Soltau *v.* De Held	2 Sim. (N.S.) 133	347
Southampton Steamboat Company *v.* Rawlins	12 W. R. 285	426
South Eastern Railway Company *v.* Brogden	3 Mac. & G. 8	258
Southmolton (Mayor of) *v.* Attorney-General	5 H. L. C. 1	42
Spratt *v.* Hobhouse	4 Bing. 173	608
Spry *v.* Directors of the Poor of Marylebone	2 Curt. 5	17
Stanley *v.* Wise	1 Cox, 432	528
State Fire Insurance Company, Re	1 D. J. & S. 634	69, 175
Stevens *v.* Hale	2 Dr. & Sm. 22	93
Still *v.* Hoste	6 Madd. 192	584
Stock, Ex parte	12 W. R. 814; 10 Jur. (N.S.) 812	194
—— and Roney's Case	10 Jur. (N.S.) 790	104
Stone *v.* Thomas	Law Rep. 5 Ch. 219	123
Storrs *v.* Benbow	3 D. M. & G. 390	505
Stevens *v.* Bayley	8 Ir. Com. Law Rep. 410	545
Stringer's Case	Law Rep. 4 Ch. 475	250
Stuart *v.* Cockerell	Law Rep. 7 Eq. 363; Ibid. 5 Ch. 713	327, 501
Sullivan *v.* Pearson	Law Rep. 4 Q. B. 153	186
Surtees *v.* Hopkinson	Law Rep. 4 Eq. 98	148, 516
Sutherland *v.* Cooke	1 Coll. 498	83
Swan, Ex parte	Law Rep. 6 Eq. 344	483
—— *v.* North British Australasian Co.	7 H. & N. 603	305

T.

Tate *v.* Clarke	1 Beav. 100	93
Tatham *v.* Wright	2 Russ. & My. 31	472
Tayler *v.* Great Indian Peninsula Railway Company	4 De G. & J. 599	306
Teague's Settlement, In re	Law Rep. 10 Eq. 564	325
Teall *v.* Watts	Law Rep. 11 Eq. 213	603
Telegraph Construction Company, In re	Law Rep. 10 Eq. 389	360
Terrell *v.* Higgs	1 De G. & J. 388	161
Thames Tunnel Company *v.* Sheldon	6 B. & C. 341	195
Thetford School Case	8 Rep. 130 b.	41
Thiedemann *v.* Goldschmidt	1 D. F. & J. 4	400
Thistlethwaite *v.* Garnier	5 De G. & Sm. 73	264
Thomas *v.* Thomas	2 Dr. & Sm. 298	238
Thompson *v.* Dunn	Law Rep. 5 Ch. 573	32
—— *v.* Robinson	27 Beav. 486	98
Thompson's Trusts, In re	5 D. M. & G. 280	367
Thomson *v.* Advocate-General	12 Cl. & F. 1	380
Thomson's Trusts, In re	Law Rep. 11 Eq. 146	516
Thornton *v.* Bright	2 My. & Cr. 230	326
Thoroughgood's Case	Co. Rep. 2, 5 b.	307

		PAGE
Thorpe *v.* Holdsworth	Law Rep. 7 Eq. 139	301
Thwaytes *v.* Dye	2 Vern. 80	374
Tipping *v.* Eckersley	2 K. & J. 264	346
Todhunter, Ex parte	Law Rep. 10 Eq. 425	606
Tollett *v.* Tollett	2 P. Wms. 489	374
Tothill's Case	Law Rep. 1 Ch. 85	195
Tottenham *v.* Emmet	14 W. R. 3	275
Townend *v.* Toker	Law Rep. 1 Ch. 446	395
Tullett *v.* Armstrong	4 My. & Cr. 377	7
Turner *v.* Newport	2 Ph. 14	385

U.

Udal *v.* Walton	14 M. & W. 254	608
Underwood *v.* Wing	4 D. M. & G. 633; 8 H. L. C. 183	238
Universal Life Assurance Company, Ex parte	Law Rep. 10 Eq. 458	484

V.

Veness, Ex parte	Law Rep. 10 Eq. 419	608
Vibart *v.* Vibart	16 W. R. 997	283
Viney *v.* Chaplin	2 De G. & J. 468	275
Vorley *v.* Cooke	1 Giff. 230	301

W.

Waldron *v.* Sloper	1 Drew. 193	308
Walker *v.* Brewster	Law Rep. 5 Eq. 25	348
——— *v.* Ware, Hadham, and Buntingford Railway Company	Law Rep. 1 Eq. 195	574
Wallace *v.* Attorney-General	Law Rep. 1 Ch. 1	380, 475
Wallop's Trusts, In re	1 D. J. & S. 656	381
Wallwyn *v.* Lee	9 Ves. 24	59
Walter *v.* Selfe	4 De G. & Sm. 315	346
Ward *v.* Woodcock	5 L. T. (N.S.) 816	291
Warrant Finance Company's Case	Law Rep. 4 Ch. 643	496
Warrick *v.* Queen's College	Law Rep. 3 Eq. 683	285
Waterlow *v.* Bacon	Law Rep. 2 Eq. 514	597
Watkin *v.* Parker	1 My. & Cr. 370	291
Watson *v.* King	1 Stark. 121	238
Watson's Trusts, In re	Law Rep. 10 Eq. 36	530
Webb *v.* Byng	1 K. & J. 580	544
Webster *v.* Boddington	26 Beav. 128	501
——— *v.* Cook	Law Rep. 2 Ch. 542	274
Weeds *v.* Bristow	Law Rep. 2 Eq. 333	98
Western *v.* Macdermott	Law Rep. 2 Ch. 72	346
Weston's Case	Law Rep. 4 Ch. 20	497
White *v.* Garden	10 C. B. 919	307
——— *v.* Ledwick	4 Doug. 247	483
——— *v.* Pearce	7 Hare, 276	185
Whitton's Trusts, In re	Law Rep. 8 Eq. 352	156

Wilce *v.* Wilce	7 Bing. 664	281
Wilde *v.* Gibson	1 H. L. C. 605	278
Wildman's Trusts, Re	1 J. & H. 299	528
Wilkinson *v.* Johnson	3 B. & C. 428	400
Willats *v.* Busby	5 Beav. 193	395
Williams *v.* Cadbury	Law Rep. 2 C. P. 453	617
——— *v.* St. George's Harbour Company	3 De G. & J. 547	160
Williamson *v.* Jefferys	12 W. R. 403	283
Willoughby *v.* Willoughby	1 T. R. 763	57, 61
Wills *v.* Wills	1 D. & War. 439	563
Wilson *v.* Wilson	28 L. J. (Ch.) 95	501
Winchester (Bishop of) *v.* Mid-Hants Railway Company	Law Rep. 5 Eq. 17	574
Wing *v.* Angrave	8 H. L. C. 183	147
—— *v.* Tottenham and Hampstead Junction Railway Company	Law Rep. 3 Ch. 740	575
Withington *v.* Tate	Law Rep. 4 Ch. 288	306
Wood *v.* Baron	1 East, 259	94
—— *v.* Morewood	3 Q. B. 440, n.	190
—— *v.* Ordish	3 Sm. & Giff. 125	540
Woodcock *v.* Monckton	1 Coll. 273	334
Woodhams *v.* Anglo-Australian Assurance Company	3 Giff. 238	484
Woodhouse *v.* Meredith	1 Mer. 450	456
Wormsley *v.* Sturt	22 Beav. 398	430
Worthington *v.* German	16 W. R. 187	307
——— *v.* Morgan	16 Sim. 547	315
Wright *v.* Pitt	Law Rep. 3 Ch. 809	285
Wyatt *v.* Cook	16 W. R. 502	274
Wynn *v.* Williams	5 Ves. 130	333

Y.

Yalland *v.* Leonard	1 Sw. 161	224
Yates, In re	21 L. J. (Ch.) 281	224
Young *v.* Grote	4 Bing. 253	305
—— *v.* Young	Law Rep. 3 Eq. 801	59

Equity Cases

(*Including Bankruptcy Cases*)

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

NETHERSOLE *v.* SCHOOL FOR THE INDIGENT BLIND.

M. R.
1870
Nov. 18.

Mortmain—9 *Geo.* 2, *c.* 36—*Impure Personalty*—*Power to take Money bequeathed or devised.*

By a private Act of Parliament a charitable institution was incorporated and empowered to have, hold, receive, and retain any sums of money paid, given, devised, or bequeathed by any person for the charitable purposes in the Act mentioned; and also to purchase, take, or receive, and thenceforth hold and enjoy any lands, tenements, and hereditaments, in the whole not exceeding two acres, without incurring any of the penalties or forfeitures of the *Statute of Mortmain* :—

Held, that the charity could not take a bequest of impure personalty.

12 Sg 447, 453, 18 Sg 90

THIS was the further consideration of a suit for the administration of the estate of *George Lay*, who, by his will, dated the 9th of January, 1865, after giving various charitable legacies, bequeathed his residuary personal estate upon trust, as to one-fourth thereof, for the *Female Orphan Asylum*, and as to another fourth for the *School for the Indigent Blind*.

Part of the personal estate consisted of money lent on mortgage, and the question was, whether the charities could take so much of the personal estate as consisted thereof.

M. R.
1870
NETHERSOLE
v.
SCHOOL FOR
THE INDIGENT
BLIND.

The *School for the Indigent Blind* was incorporated by a private Act of Parliament, 7 Geo. 4, c. lxviii., by sect. 1 of which it was enacted that there should thenceforth be a corporation for the reception, maintenance, and employment of blind persons in indigent circumstances; that the persons therein mentioned should be members of such institution; and the president, vice-presidents, treasurer, and members of the said institution should be, and they were thereby declared to be, a body corporate under the name of "*The President, Vice-Presidents, Treasurer, and Members of the School for the Indigent Blind,*" and by that name should have perpetual succession and a common seal; and that they and their successors by the same name might sue and be sued; and that they and their successors, by the name aforesaid, should be able and capable in law to have, hold, receive, enjoy, possess, and retain, for the purposes of the Act and in trust for the benefit of the said institution, all such sum and sums of money as had been paid, given, devised, or bequeathed, or should at any time or times thereafter be paid, given, devised, or bequeathed by any charitable or well-disposed person or persons to and for the charitable purposes and ends in the Act mentioned; and that they and their successors, by the name aforesaid, might at any time or times thereafter purchase, take, or receive, and thenceforth hold and enjoy, any lands, tenements, or hereditaments, in the whole not exceeding two acres, for any estate or interest whatsoever, for the purposes of the said charity, without incurring any of the penalties or forfeitures of the Statutes of Mortmain.

The *Female Orphan Asylum* was also incorporated by Act of Parliament in terms, *mutatis mutandis*, identical with the above.

Mr. *Southgate*, Q.C., and Mr. *Plummer*, for the trustees of the will.

Sir *R. Baggallay*, Q.C., and Mr. *Cookson*, for the *School for the Indigent Blind*:—

It was decided in *Robinson* v. *Governors of London Hospital* (1) that a provision that a charitable corporation might, notwithstanding the *Statute of Mortmain*, "have, take, hold, and enjoy" real estate,

(1) 10 Hare, 19.

did not remove the disability imposed on testators by 9 Geo. 2, c. 36, so as to enable them to devise lands to the charity; and that such a provision only enabled the corporation to take and hold such lands as might be properly conveyed to them in accordance with the provisions of that statute. That case was followed in *Chester* v. *Chester* (before Vice-Chancellor *Wood*, 25th of February, 1867) upon the occasion of a bequest of leaseholds to the charity we now represent. With these decisions we do not quarrel; but we say that they have no reference to the present case. We contend that the Legislature, by enacting that the *School for the Indigent Blind* might take and hold any sums of money "bequeathed or devised" to it, implicitly enacted that testators might bequeath impure personalty to this charity. On any other construction the words "bequeathed" and "devised" must be struck out of the Act; for there is nothing to prevent any corporation from taking a bequest of pure personalty.

Mr. *Hadley*, for the *Female Orphan Asylum*, referred to several private Acts of Parliament incorporating charities, and particularly to those with reference to the *British Museum*, and *St. George's Hospital*, under which those institutions had notoriously held lands devised to them, although there were no express enactments that testators should have power so to devise lands, but merely general provisions empowering the institutions, by will, gift, or otherwise, to acquire, hold, and retain lands.

Mr. *Bovill*, and Mr. *Horsey*, for other charities interested in the estate.

Mr. *Wickens*, for the Attorney-General, was not called upon.

LORD ROMILLY, M.R.:—

I have often had clauses such as these before me, and have quite made up my mind as to their meaning. I omit all consideration of the cases brought to my attention by Mr. *Hadley*, in which charities are expressly empowered to take lands given to them by will. It is not my intention to decide anything as to these cases, which are not before me on this occasion. I intend merely to decide upon cases where there is a clause which enables a charity, by bequest

12 Eq 488.

M. R. 1870 NETHERSOLE v. SCHOOL FOR THE INDIGENT BLIND.

and devise, to take and hold any sums of money for the purposes mentioned, and also enables them to hold land for the purposes of the charity. I am of opinion that such a clause does not enable any person to devise to the charity any interest in land.

The sole argument brought forward in support of that contention is, that you strike out words from the Act of Parliament if you do not give them this meaning; but I am not of that opinion. This is an Act of Parliament constituting a charitable institution a corporation. Until it is a corporation it cannot take any money; and it is usual in an Act of Parliament, where it makes a corporation, to recapitulate the powers with which the corporation is to be endowed; and that is what is done here. The Legislature, in fact, says: "We think fit to make you a corporation and to endow you with certain powers and rights which belong to a corporation, viz.;" and then these powers and rights are enumerated, and amongst them the power of holding property in land. Now, it would be a strong thing to hold that, when the Act says, "You may take any money bequeathed or devised to you, and you may, notwithstanding the *Statute of Mortmain*, take land, provided it is not more than two acres," the use of the words "bequeath" and "devise" in effect repeals the restriction imposed as to land; for it is clear that the Act of Geo. 2 extends to all interests in land, and money secured by mortgage is an interest in land. Therefore, without saying anything as to the *British Museum*, or the other institutions which have been referred to, I am of opinion that the *School for the Indigent Blind* and the *Female Orphan Asylum* cannot take impure personalty bequeathed to them.

Solicitors: Messrs. *Nethersole & Speechly;* Messrs. *Grueber & Cooper;* Messrs. *Booth & Lane;* Messrs. *Raven & Bradley.*

HAWKES *v.* HUBBACK.

M. R.
1870
Nov. 23.

Marriage Settlement—Trust for separate Use—Second Marriage.

By a marriage settlement the income of the trust funds was, during the life of *L.*, to be for her separate use, independently of the control of her intended husband, and so that her receipts alone should be sufficient discharges, without power of anticipation. The husband died, and *L.* married again:—

Held, that the trust for separate use revived on her second marriage.

23 L.J.Ch. 714
7 Jur. N.S. 702

SPECIAL CASE.

By a settlement on the marriage of *James Gordon* and *Lydia Macaulay* it was agreed that the trustees should hold the trust funds upon trust that they should, during the life of the said *Lydia Macaulay*, "pay the income to the said *Lydia Macaulay* for her separate use, independently of the debts or control of her said intended husband, and so that her receipts alone should be sufficient discharges, and so that she should not have power to deprive herself thereof by anticipation;" and after the death of the said *Lydia Macaulay* the trustees were to hold the said trust funds in trust for her children, as therein mentioned.

James Gordon died in 1864, in his wife's lifetime. In 1868 his widow married the Plaintiff, *George Hawkes*. No settlement was made on the second marriage. The question was, whether the trust for separate use, with restraint on anticipation, revived upon the second marriage. The Plaintiff submitted that it ceased altogether on the first husband's death, and that the income was now payable to him. The trustees submitted that the income could not be paid to the Plaintiff without the decision of the Court.

Mr. *Chitty*, for the Plaintiff:—

I contend that the trust in this settlement, as regards the separate use, was limited to the first marriage. This contention may appear inconsistent with the case of *In re Gaffee* (1), which was under a post-nuptial settlement, and where a restraint against

(1) 1 Mac. & G. 541.

M. R. 1870 HAWKES v. HUBBACK.

anticipation was held to apply to the whole life of the wife, and to be binding on her second marriage. But there were words in that case clearly applicable to each coverture. In *Knight* v. *Knight* (1) and *Benson* v. *Benson* (2) it was held that the trust for separate use was limited to the first coverture.

[The MASTER OF THE ROLLS :—Both those cases were overruled by the decision in *In re Gaffee* (3).]

As far as regards the question of construction, I submit that *Benson* v. *Benson*, which strongly resembles this case, was not overruled.

In *Moore* v. *Morris* (4), where there was a devise to *Jane Davidson*, the wife of *Henry Davidson*, for her separate use, and a bequest of personal estate to her for her separate use, independent of *Henry Davidson*, her husband, and her receipts alone to be sufficient discharges, it was held that the limitations to the lady's separate use did not extend beyond the husband specifically named; and Vice-Chancellor *Kindersley* observed (5): "I hardly know what language could be found to express more distinctly that it was intended that what was given was to be independent of that particular husband. The testator gives it in terms free and independent of that particular husband; and if I were to decide that by the words used it was meant that if ever Mrs. *Davidson* should marry again the gift should be for her separate use, independent of any subsequent husband, I should be overthrowing the whole principle on which the doctrine of separate use stands. The *jus mariti* is not to be curtailed by ambiguous terms, but by clear and unanswerable expression of intention."

The same principle applies to the present case; the reference is made to the then "intended husband," the object being to exclude his marital right, and the receipt clause must be construed as referring to the first coverture, and that only.

Mr. *M. T. Martin*, for Mrs. *Hawkes*.

Mr. *W. F. Robinson*, for the trustees, was not called on.

(1) 6 Sim. 121.
(2) Ibid. 126.
(3) 1 Mac. & G. 541.
(4) 4 Drew. 33.
(5) 4 Drew. 37.

LORD ROMILLY, M.R.:—

This case appears to me to be quite clear, and to be established by the cases which Mr. *Chitty* has cited.

All the cases before *In re Gaffee* were there disposed of by Lord *Cottenham* in a few words (1): "These cases, proceeding upon a supposed rule of equity, which does not now exist, and it being now settled that a gift to the separate use, without power of anticipation, will operate upon all the covertures of a woman unless the provisions are destroyed whilst she is discovert, these cases cannot be considered as authorities applicable to the question in this case." I adopt those words. Here the trust is that during the life of the lady the income is to be paid to her separate use, without power of anticipation.

In *Moore* v. *Morris* (2), Vice-Chancellor *Kindersley* assents to *In re Gaffee* (3), and says that, if he had words of the same character, he should come to the same conclusion; but there the gift was in express terms, independent of the husband there named, and of none other. But here the words are distinct, that during the life of this lady, that is, during her whole life, the income is to be paid to her separate use, without power of anticipation. Nothing would give rise to greater difficulties than to make these cases turn on refined distinctions. It is true that it is to be free from the control "of her intended husband," but that cannot control the words limiting the income to her separate use during her life. She might, of course, have disposed of it as she pleased after the death of her first husband, but she not having done so, according to the principle of *Tullett* v. *Armstrong* and *Scarborough* v. *Borman* (4), the trust revived upon her second marriage.

Solicitors: Messrs. *Field, Roscoe, & Co.*

(1) 1 Mac. & G. 547.
(2) 4 Drew. 33, 39.
(3) 1 Mac. & G. 541.
(4) 4 My. & Cr. 377.

M. R.
1870
Nov. 17.

DE LA SALLE *v.* MOORAT.

Practice—Summons for Administration of Real Estate—Trust for Sale after Five Years—15 & 16 Vict. c. 86, s. 47.

The Court has jurisdiction, under 15 & 16 Vict. c. 86, s. 47, to make an order on summons for the administration and sale of a testator's real estate devised to trustees, who were also executors, in trust for sale, with a proviso that part thereof should not be sold till after five years unless in the meantime a certain sum could be obtained for it.

THIS was a motion to stay proceedings in an administration suit after a summons had been taken out for the administration of the same estate.

The testator, *J. S. Moorat*, by his will, gave his real and personal estate to his trustees, who were also his executors, upon trust that they should, as soon as conveniently might be after his death, sell all his real estate (excepting only his estate at *Bush Hill*, as to which he declared his will to be that the same should not be sold until after the expiration of five years from his death, unless in the meanwhile the sum of £80,000 could be obtained for the same), and should convert into money his personal estate, and stand possessed of the moneys arising from such sale or conversion upon the trusts therein mentioned.

On the 5th of July, 1870, a bill was filed against the trustees by one of the persons entitled under the will for the administration of the testator's real and personal estate.

On the 26th of July, 1870, a summons for the administration of the testator's real and personal estate was taken out by two other persons entitled under the will; and on the 6th of August, 1870, a decree was made on the summons, directing the usual accounts and inquiries, with an inquiry whether it was fit and proper that the real estate should be sold.

Mr. *Bagshawe* now moved, on behalf of the Defendants in both suits, that the proceedings in the first-mentioned suit might be stayed.

Mr. *Roxburgh*, Q.C., and Mr. *C. Browne*, for the Plaintiffs in the first-mentioned suit, submitted that it was doubtful whether the

Court had jurisdiction to make a decree for sale on summons under 15 & 16 Vict. c. 86, s. 47, when the trust for sale of part of the property was to be postponed for five years unless a specified price were obtained for it. The proper course would be for the decree to be taken in both suits. They referred to *Colman* v. *Turner* (1).

LORD ROMILLY, M.R., considered that the decree on summons was properly made, as the trustees for sale could give good receipts for the purchase-money, and directed that the proceedings in the first suit should be stayed.

Solicitors: Messrs. *Palmer, Eland, & Nettleship;* Messrs. *Denton, Hall, & Barker.*

(1) Law Rep. 10 Eq. 230.

V.-C. M.
1870
Nov. 3.

HEPWORTH *v.* HEPWORTH.

Gift to a Child—Advancement—Presumption of Intention—Absolute Gift.

A testator, by his will, settled £1000 Reduced Annuities on each of his three granddaughters, the children of his only son, and two years afterwards he transferred a sum of £3200 Reduced Annuities, which was all the property he possessed, into the name of his son. He died at the age of ninety-four, having resided the last ten years of his life with his son, who was a man of considerable property:—

Held, that the transfer to the son operated as an absolute gift to him, free from any trusts.

LUKE HEPWORTH, by his will, dated in December, 1845, gave to each of his three granddaughters, the children of his only son, *Boughey Hepworth*, the interest of £1000 £3 per Cent. Reduced Bank Annuities for life, and afterwards the capital to be equally divided between the issue of such grandchildren; and the testator appointed his son sole executor and residuary legatee of his will.

On the 6th of April, 1847, *Luke Hepworth* transferred the sum of £3200 Reduced Bank Annuities into the name of his son, *Boughey Hepworth*. No deed or declaration of trust was executed upon such transfer, and there was no evidence shewing under what circumstances the transfer was made, the only document relating thereto which could be found being the "broker's note" given upon the transfer.

Luke Hepworth died in May, 1849, at the age of ninety-four years, having resided with his son, *Boughey Hepworth*, who was a man of considerable property, for the last ten years of his life, and at the time of his death he was not possessed of any sum of Reduced Annuities, in consequence of which the legacies given by his will failed.

Boughey Hepworth, soon after the date of the above transfer, and in the lifetime of his father, sold out the £3200 Reduced Annuities, and applied the money to his own use.

In May, 1866, *Boughey Hepworth* made his will, and thereby gave a small portion of his property to his three daughters absolutely, but the greater portion he gave to his wife, *Ann Hepworth*, for life, with remainder to his daughters and their children. He

died in March, 1869, and this bill was filed by *Ann Hepworth*, for the purpose of obtaining a declaration that the transfer by *Luke Hepworth* to his son *Boughey Hepworth* in 1847 operated as an absolute gift to him of the £3200, and that it was not intended that such sum should be held by the son upon any trust whatever.

Mr. *Glasse*, Q.C., and Mr. *Owen*, for the Plaintiff:—

It is admitted that no evidence exists respecting the object of *Luke Hepworth*, the father, in transferring this sum of £3200 to his son during his lifetime; the only evidence relating to the transaction is the broker's note of transfer. It can only be supposed, therefore, that the father intended to make an absolute gift of that sum to his son, and according to the rule of law in such cases, the gift must be considered as having been made for the advancement and support of the son. The legacies given by his will, made two years before the transfer, failed by reason of there being no assets of the testator forthcoming; and the son being now dead the £3200 transferred into his name, and afterwards appropriated by him as part of his own property, must be applied in conformity with the son's will: *Sayre* v. *Hughes* (1); *Sidmouth* v. *Sidmouth* (2); *Elliott* v. *Elliott* (3).

Mr. *Joshua Williams*, Q.C., and Mr. *J. T. Anderson*, for the Defendants:—

The obligation upon a father to provide for his son is the foundation of the rule that a gift by him to his son must be considered as an advancement; but the facts of this case shew that the money so transferred to the son could not have been intended by the father as an advancement, since the son was a man of property, and his father was actually maintained by him, or, at any rate, lived in his house, and was taken care of by him. Lord *St. Leonards*, in his book (4), in citing *Elliot* v. *Elliot*, and other cases of a similar nature, says: "The child must be unadvanced, but an advancement in part is not material. And even if the child be advanced, yet, if the father consider him unadvanced, that will be sufficient. If the child is already provided for, and the father did not consider

(1) Law Rep. 5 Eq. 376.
(2) 2 Beav. 447.
(3) 2 Cas. C. 231.
(4) Vend. and Purch. 14th Ed. p. 704.

V.-C. M. 1870 HEPWORTH v. HEPWORTH.

him unadvanced, or if the father consider the child from the first as a trustee for him, he will be held to be so." This shews that the question, whether the son is advanced, and whether the father considered him to be advanced, is really the point upon which the authorities go. The same doctrine was laid down by Lord *Nottingham* in *Grey* v. *Grey* (1), where it was held that, after a son had been fully advanced by the father, a subsequent purchase by the father in the name of his son was in the nature of a trust, all presumption of an advancement having ceased. The rule relied upon by the Plaintiff's counsel arises from the dependent position of the son towards the father. Here the position is reversed, as the father was dependent upon the son. In *Garrett* v. *Wilkinson* (2) the relation of solicitor and client subsisting between the parent and child was held sufficient to exclude the ordinary presumption in favour of the transaction being a gift, and threw the burden of proof upon the son, or rather upon his executors, who in that case were declared to be merely trustees of the money; and in *Bone* v. *Pollard* (3) a sum of stock invested by a father in the names of his two daughters was held, under the circumstances, to form part of his estate, and not to be an advancement to them. In *Sayre* v. *Hughes* (4), Vice-Chancellor *Stuart* recognised these authorities as good law, but came to the conclusion upon the evidence that there was a presumption of an intended benefit to the daughter.

Mr. *Knox*, for the trustees.

SIR R. MALINS, V.C.:—

The facts of this case are not in dispute, and the question is, what was the effect of the transfer of the £3200 by *Luke Hepworth* to his son *Boughey Hepworth* in April, 1847. The law is not doubtful that if this had been a transfer to a stranger it would have operated as a trust, but if a gift is made in favour of a child the presumption of law is, that it is intended as an advancement or provision for the child. The old cases turned upon the question, whether the child was provided for or not, but recent authorities have gone upon whether the gift was intended as an advancement or not.

(1) 2 Sw. 594.
(2) 2 De G. & Sm. 244.
(3) 24 Beav. 283.
(4) Law Rep. 5 Eq. 376.

Thus, in the present case, the transfer having been made to the son, it is thrown upon those who deny that it was an absolute gift to prove that there was no intention on the part of the father to make an advancement or provision for his son. Here the son was evidently capable of maintaining himself, for it is in evidence that he was possessed of considerable property, and, in fact, it was the son who maintained his father. That he well performed the duty of taking care of him is evident from the fact that the father lived with the son for ten years, till his death at the age of ninety-four. The father, on the other hand, had no object in the world upon whom to bestow his property but his son and his son's children, and it was the most natural thing that the father should have come to the determination to make over to his son during his lifetime this property, being well satisfied that what he gave to his son would be disposed of in the way he considered best for the benefit of his own children. The son seems to have been perfectly ready to fulfil this duty, since by his will he left all his property for the benefit of his wife and children. It is said that the father was under the influence of the son; but, on the other hand, it seems just as probable that the father should think that, whatever he gave to his son, his son should have the power of disposing of as he thought best.

As to the old case of *Elliot* v. *Elliot* (1), it appeared that the father had previously made a provision for his son, and the Lord Chancellor drew the distinction between a son formerly married and provided for and the case of a son for whom no provision had been made by the father. In *Sidmouth* v. *Sidmouth* (2) an observation by Lord *Langdale* is very appropriate, where he says: "The parent may judge for himself, when it suits his own convenience, or when it will be best for his son, to secure him any benefit which he voluntarily thinks fit to bestow upon him; and it does not follow that, because the reason for doing it is not known, there was no intention to advance at all." Here the father was at liberty to say he would give this sum to his son, and there is no presumption to rebut the *primâ facie* rule of law, that a father who gives property to his son does so by way of advancement or provision for him. I am, therefore, bound to presume that the effect of the transfer of stock by the father, *Luke Hepworth*, to his son was to

(1) 2 Cas. C. 231. (2) 2 Beav. 447, 456.

V.-C. M. 1870 HEPWORTH v. HEPWORTH.

make an absolute gift to him. The case of *Garrett* v. *Wilkinson* (1) is in support of the view I take, and it was only on the ground that the relation of solicitor and client existed between the mother and son that the gift was held to operate as a trust. The case of *Bone* v. *Pollard* (2) turned upon the special circumstances existing there, and the Master of the Rolls said, "I must admit that there are several cases, such as *Sidmouth* v. *Sidmouth* (3), which would seem at first sight to be at variance with the view I have taken in this case; but, in my opinion, this case depends on the facts and peculiar nature of the evidence in the cause, and therefore it is not from doubting, or from not being prepared to follow those authorities, that I come to a different conclusion in this case." That authority cannot, therefore, be considered as having any application to this case. The case of *Sayre* v. *Hughes* (4), before Vice-Chancellor *Stuart*, is a positive authority in favour of what I am deciding upon the general presumption arising from the relation of parent and child. It was there decided that there being a transfer of stock to a child by the parent, without any evidence to rebut the presumption of an intended benefit, the child was entitled absolutely to the money so transferred.

My opinion, therefore, is, that the son, *Boughey Hepworth*, became the absolute owner of this money; and there must be a decree in favour of the Plaintiff.

Solicitor for all Parties: Mr. *W. D. Davies.*

(1) 2 De G. & Sm. 244.
(2) 24 Beav. 283, 288.
(3) 2 Beav. 447.
(4) Law Rep. 5 Eq. 376.

Ex parte RECTOR OF LIVERPOOL.

V.-C. M. 1870 Nov. 4.

Burial-ground—Rights of Rector—Freehold of Churchyard—Burial Fees—Lands Clauses Act—Receipt of "Rents and Profits"—Dividends on Fund in Court.

A rector having the freehold of a churchyard, and having enjoyed the right to burial fees, is the person entitled, under sect. 70 of the *Lands Clauses Act*, to the receipts of the rents and profits.

Therefore, where a piece of land constituted by Act of Parliament the churchyard of a parish, but which had been closed for burials under an Order in Council, was taken under sect. 70 of the *Lands Clauses Act*, and the purchase-money paid into Court, though the land at the time it was taken was entirely unproductive either as regarded burial fees or otherwise:—

Held, that, whatever might be the ultimate destination of the *corpus* of the fund, the dividends, so long as it remained in Court, must be paid to the rector of the parish for the time being.

THIS was a Petition for payment of the dividends on a fund in Court, paid in under the decree in *Campbell* v. *Mayor and Corporation of Liverpool* (1) to the rector for the time being of *St. Peter's Church, Liverpool.*

The township of *Liverpool* was constituted a distinct parish under an Act of 10 & 11 Will. 3, c. 36, which provided that the inhabitants should erect and build a new church, and provide and inclose a cemetery, churchyard, or burying-place about the same; and that the said church, and the ground thereunto belonging to be inclosed and used for a cemetery or churchyard, should be the parish church or churchyard of the said parish of *Liverpool;* and the same was thereby enacted and declared to be for ever separated and dedicated to the service of God, and to be applied to the use and behoof of the inhabitants. The church of *St. Peter* was built accordingly, and the burial-ground was inclosed, and continued to be used as the burial-ground of the parish till it was closed for burials by an Order in Council made on the 7th of April, 1854, and a new burial-ground was provided by the select vestry.

A portion of the burying-ground was taken for the purpose of widening a street by the corporation, acting as Commissioners under the *Liverpool Improvement Act*, 1864, which incorporated

(1) Law Rep. 9 Eq. 579.

V.-C. M. 1870

Ex parte RECTOR OF LIVERPOOL.

the *Lands Clauses Consolidation Act.* The purchase-money of the piece of land taken was ultimately fixed at £5500, which included a sum of £350 to be spent in inclosing the remaining portion. The corporation having claimed to retain the sum of £5150, on the ground that by the closing of the burial-ground the land had reverted to them as donors, the suit of *Campbell* v. *Mayor and Corporation of Liverpool* (1) was instituted to determine the right to the purchase-money; and a decree was made on the 10th of February, 1870, by which the corporation was ordered to pay into Court the £5150, together with interest at 5 per cent. from the 20th of January, 1868. Accordingly, on the 9th of March, 1870, the corporation paid into Court £5683 7*s.* 6*d.*

The Petition was presented by the late rector, and on his death on the 15th of May, 1870, was amended by making the present rector and the executors of the deceased rector Petitioners. It was served on the churchwardens of the parish, as being the proper persons to represent the select vestry, on whom was laid the obligation to provide sufficient burial-grounds.

Mr. *Cotton*, Q.C., and Mr. *Charles Stewart*, in support of the Petition:—

The piece of ground taken is part of the parish churchyard, and the rector is entitled at Common Law to all rents and profits arising from the churchyard which are consistent with its use for the purpose of burials. The only parties who could have any interest in objecting would be the burial board, and their only interest can be in the principal sum, if it is ever required for providing a new burial-ground. The case of *In re St. Pancras Burial Ground* (2) decided that the Order closing the ground was only a suspension of burials, and the dividends were directed to be paid to the trustees, who were in that instance, by Act of Parliament, put in the place of the rector. In a subsequent case of *Re St. Andrew's Burial Ground, Holborn,* before the same Judge, the same principle was followed, and the right to the ground was treated as being vested in the persons entitled to the burial fees.

(1) Law Rep. 9 Eq. 579. (2) Law Rep. 3 Eq. 173.

V.-C. M.
1870
Ex parte RECTOR OF LIVERPOOL.

Mr. *Millar*, for the churchwardens, as representing the select vestry:—

The select vestry oppose the Petition on public grounds, and if the fund is handed over to them it will be applied for the benefit of the whole of *Liverpool*. The rector must bring himself within the 70th section of the *Lands Clauses Consolidation Act*. He must rest his claim either on the right to receive burial fees or on the right to the freehold of the churchyard. As to the freehold, the rector is not the person entitled to the rents and profits of the land, his right being subject to that of the parishioners to have the surface disturbed for burial: *In re St. Pancras Burial Ground* (1); *Burn's* Ecclesiastical Law (2); *Cripps'* Laws of the Church and Clergy (3). In this instance portions of the ground have been bought by different persons for their exclusive use, and if the rector has any right in the freehold they will have similar rights. As to burial fees, the rector has no right at Common Law to receive any, and there is no proof in this case of a custom to receive fees: *Cripps* on the Law of the Church and Clergy (4); *Spry* v. *Directors of the Poor of Marylebone* (5); *Andrews* v. *Cawthorne* (6). Moreover, he does not claim on the ground of the right to receive fees. *In re St. Pancras Burial Ground* turned entirely on the question of fees, and the income was paid to the persons entitled to receive the fees. If the question is put on the ground of fees, the clerk and sexton are entitled to a portion of the income, for their right is co-extensive with that of the rector.

Mr. *W. F. Robinson*, for the *Liverpool Burial Board*, asked to have inserted in the order the words "till further order," to enable any application to be made with regard to the *corpus* of the fund.

Mr. *Freeling*, for the corporation, objected to pay the costs of adverse litigation.

Mr. *Cotton*, in reply:—

The question is, who can shew himself to have been entitled to

(1) Law Rep. 3 Eq. 173.
(2) Vol. i. p. 258 A.
(3) 5th Ed. p. 504.
(4) 5th Ed. p. 794.
(5) 2 Curt. 5.
(6) Willes, 536.

V.-C. M. 1870 *Ex parte* Rector of Liverpool.

the rents and profits at the time the land was taken. The rector was legal owner of the freehold in the churchyard, and, as such, entitled to any profits there might be, subject only to the right of the parishioners to be buried there, and to its not being used in any manner inconsistent with the rights of the parishioners. The new cemeteries were not provided as substitutes for the old ground, and that act did not take away his interest in the freehold.

Sir R. Malins, V.C.:—

The facts of this case are peculiar, although similar cases have occurred before. They are fully stated in the report of *Campbell* v. *Mayor and Corporation of Liverpool*, a case which was before me, and decided on the 10th of February last (1). The short facts are that, in the reign of Will. 3, *St. Peter's Church* was established in *Liverpool*, the burial-ground or churchyard adjoining that church was provided and continued to be used as the burial-ground of the parish from that time down to the year 1854, when, by an Order in Council, in pursuance of the Act of Parliament for that purpose, for sanitary reasons the burial-ground was closed, and from that time no burials have taken place in it. In the year 1864, I think it was, an Act of Parliament having been passed for the improvement of the town of *Liverpool*, the Commissioners, acting under that Act of Parliament, found it necessary, for the purpose of widening a street, to take part of this burial-ground. They had compulsory powers to take it under that Act of Parliament; they exercised those powers by serving the usual notice to treat upon the corporation, and ultimately the question of the value of the land was referred to the arbitration of Mr. *Manisty*, who awarded a sum of £5150 as the value of that land. The question before me in the cause in February last was, whether the corporation, although that had been ascertained to be the value of the land, were bound to pay it. That case was fully argued, and I decided that they were bound to pay for the land. The money has been brought into Court, and this Petition is presented to have the opinion of the Court upon that which I stated to be a question certainly not free from difficulty, namely, who, under the peculiar

(1) Law Rep. 9 Eq. 579.

circumstances of the case, is entitled to the dividends of that particular fund, amounting to about £6000 consols?

The case, as I repeat, is not free from difficulty, because it is plain that, from the year 1854 downwards, the rector of the parish has had no profit whatever from this land, nor was there any probability that at any time he or his successors would hereafter have any profit. It was closed as a burial-ground, and, although it is undoubtedly true that the order for closing may be altered, or even totally revoked, it was so improbable that that event would take place, that virtually it may be considered that the rector had ceased to have any interest in this land. Therefore, of course, if he gets it now it will be a sort of windfall. I cannot regret his having it, because I think it right that the church should be well endowed; and of all the claimants that have appeared before me I think the rector, upon general public principles, has far the better claim.

With regard to the claim set up by Mr. *Millar* for the parties who have provided the new burial-ground, which became necessary in consequence of the closing of the old one, it is perfectly plain, I think, that they have no kind of interest—they never had any interest—in this land, nor is it possible they ever could have. They had none while it was a burial-ground, for they did not exist at that time, and when it ceased to be a burial-ground, for the reasons I have stated, the rector ceased to have any interest; and it is perfectly clear they could have no interest in it. But more than that, if it should ever be reopened, it is perfectly clear, so far from being to their benefit, it would be to their detriment, because as many burials as took place in this ground would be taken away from their ground, and they would be losers. It is impossible, therefore, that in any view of the case they can have any interest in this ground, and I am quite satisfied, and I repeat what I said to Mr. *Millar* (and his very able argument has more fully satisfied me), that whoever may be entitled to this money, it is perfectly clear his clients never can have it. I can quite understand it might not have been an unreasonable arrangement, when the old burial-ground was closed, that it should have been provided that, if it should from any unforeseen accident become of value, those who had had the expense of providing the new burial-

V.-C. M. 1870

Ex parte Rector of Liverpool.

ground should be paid for whatever value should be derived from the old. But no such thing was ever thought of, nothing of the sort was provided for, and so matters now stand: it is absolutely impossible that in any event which can happen, unless an Act of Parliament is passed (which of course I cannot presume), that the body represented by Mr. *Millar* can have any interest. I therefore can have no difficulty whatever in deciding the case against them.

Then comes the only other claimant before me, the rector of the parish. How stands the matter with regard to him? The freehold of the land undoubtedly was and is in him. The rector or vicar of a parish undoubtedly has a freehold in the churchyard. He is the freeholder, he has the right to the herbage, but he must not use it in such a manner as to be detrimental to the public use to which the land is dedicated; he must keep it in decent order. The obligations are clear which are attached to the freehold, but still he remains the freeholder, and I apprehend that in the present case, after the Order in Council closing this ground in the year 1854, the freehold remains just as much in the rector for the time being as it was before; he is therefore the freeholder of this land. Then, being the freeholder, what is his position? Undoubtedly, for the reasons I have stated, the land did not at the time that it was taken produce any profit to him, nor would it produce any profit now if it had not been taken by the corporation, nor is it likely that it will produce any profit hereafter; but still, if from any unforeseen circumstances the Order in Council shall be revoked, the freehold is in him, and to him will revert the right to fees for burials which he enjoyed before the ground was closed. I am therefore not able to see that there is any body or corporation in existence who has any interest except the rector. It is said by the law of *England* that the freehold of all land must be somewhere—it is never in abeyance; and undoubtedly, in this case, the freehold of this land taken by the corporation is in the rector. Then, if the freehold is in him, must I not recognise the person in whom the freehold is as being entitled to the perception of profits, whatever profits there are or may be? There is much land in this country, which does not produce any immediate profit, in which the ownership is just as absolute as if it

actually at the present moment produced profit. There is only one person, I repeat, now in existence who has any interest in this land, and that is the rector of the parish.

That would be my view of the case if it had not been previously considered; but I am happy to find that a precisely similar point (for I am unable to see, after hearing the argument, any distinction between this case and *In re St. Pancras Burial Ground* (1)) was decided by Vice-Chancellor *Wood* in 1866. That was the case of a burial-ground provided at the parish expense, in which the burial fees were divided, in a manner which it is not necessary to go into, between the incumbent of the parish and the churchwardens. The churchwardens were the trustees. There the land was taken for railway purposes, as here for the improvement of the town, but under a similar Act of Parliament; and there the decision was that the income of the money arising from the sale of the land was to be paid to the trustees. The Vice-Chancellor says, "Therefore the right course now is to make simply an order as prayed, and that these accumulations and the future dividends be paid to the trustees;" that is, to be paid to precisely the same persons as would have been entitled to the burial fees if the burial-ground had not been closed.

Again, before the same learned Judge, in the case of *St. Andrew's, Holborn,* where the incumbent and churchwardens were entitled to receive the burial fees in certain proportions, the land having been taken for the *Holborn Valley Improvement,* the same question arose, and precisely the same course was adopted, namely, the income of the money produced by the sale of the land was paid to the persons who would have been entitled to the burial fees if it had been used for the purpose to which it was dedicated. Upon principle, therefore, and upon the authority of those cases, I come to the conclusion that the only person who has any interest in this land is the actual freeholder for the time being, the rector of the parish; and to him therefore these dividends must be paid until further order.

With regard to those other two persons who are suggested to have an interest, namely, the parish clerk and the sexton, I agree with what Mr. *Cotton* said, that although in a certain manner they

(1) Law Rep. 3 Eq. 173.

V.-C. M. 1870

Ex parte RECTOR OF LIVERPOOL.

have an interest that burials shall take place, because the parish clerk for attending personally would have a fee, and the sexton would have his fees for opening the ground, yet I cannot regard them as having any interest in the soil. I think they have acted wisely in not coming forward, because if they were here I should have had to dismiss their claim, as in my opinion they have no interest in the soil, but have money rights only. I do not think it necessary to make any reference to them. The order will be as prayed: until further order pay the dividends of the fund, after such costs as will have to be paid out of it, to the present rector and his successors for the time being.

With regard to the costs, the right course will be for the corporation to pay the Petitioner's costs, who must have come before the Court; and that Mr. *Millar's* clients, who have come and have not sustained their case, should bear their own costs. At the same time, considering the peculiarity of the case, I should suggest as the fair course that the corporation should pay the costs of the Petition, and that the costs of Mr. *Millar's* and Mr. *Robinson's* clients should be paid out of the fund.

Solicitors for the Petitioners: Messrs. *Field, Roscoe, & Co.*

Solicitor for the Vestry of *St. Peter's:* Mr. *J. B. Batten.*

Solicitors for the Corporation of *Liverpool:* Messrs. *Torr, Janeway, & Tagart.*

Solicitors for the Burial Board: Messrs. *Sharpe, Parkers, & Pritchard*

Ex parte RECTOR OF ST. MARTIN'S, BIRMINGHAM.

V.-C. M.
1870
Nov. 18.

Burial-ground—Rights of Rector—Freehold of Churchyard—Burial Fees—Lands Clauses Act—Receipt of "Rents and Profits"—Trust for the Use of the Inhabitants—Additional Ground provided by Rates—Dividends on Fund in Court.

A rector who has enjoyed the right to burial fees from a burial-ground, the freehold of which is vested in trustees, is the person entitled under sect. 70 of the *Lands Clauses Consolidation Act* to the receipt of the rents and profits.

By an Act of Parliament reciting the insufficiency of an existing churchyard, the rector and churchwardens and certain other persons were constituted trustees, and empowered to enlarge the existing churchyard and to buy land for an additional burial-ground, to be conveyed to the rector and churchwardens "for the use of the inhabitants of the parish." In 1849 a portion of the land purchased under the Act was taken by a railway company, and the purchase-money paid into Court under the *Lands Clauses Consolidation Act*. The burial-ground was subsequently closed for burials:—

Held, that, inasmuch as the land was intended as an addition to the churchyard, the rights of the rector therein were the same as his rights in the old churchyard, so far as they were not affected by the Act under which the land was purchased, and that he was entitled to the dividends on the fund in Court so long as it remained there.

THIS was a Petition for payment to the rector of *St. Martin's, Birmingham*, of the dividends on a fund in Court representing the purchase-money of a portion of a burial-ground belonging to the parish of *St. Martin*, and taken by the *London and North Western Railway Company*.

By an Act of 47 Geo. 3, c. xv. (1807), reciting that the population of the extensive town of *Birmingham* had of late years considerably increased, and that the churchyard or burial-ground belonging to the parish of *St. Martin* was of very small extent, and not sufficiently large for the interment of persons who died in the said parish, and that it would very much contribute to the health and accommodation of the said parish if the said churchyard was enlarged, and if certain houses and buildings surrounding the same were taken down, and the ground on which such houses and buildings then stood were added thereto; and that it was also expedient that an additional burial-ground should be provided for the use of the said parish, the rector and churchwardens and certain other persons were appointed trustees for putting the Act in execution.

V.-C. M. 1870 *Ex parte* Rector of St. Martin's, Birmingham.

And it was enacted (sect. 11) that for the purpose of enlarging the said churchyard, and for providing an additional cemetery or burial-ground for the use of the inhabitants of the said parish, the said trustees should have full power and authority to treat and agree with any person or persons interested in any messuages, lands, tenements, and hereditaments in the parish of *Birmingham*, for the purchase of his, her, or their interest therein. The Act then empowered bodies corporate, and trustees for persons under disability, and persons having partial interests in land, "to contract for, sell, convey, assign, and surrender unto the rector and churchwardens of the parish of *St. Martin*, in the town of *Birmingham*, in trust for the inhabitants of the said parish, all his, her, and their right and interest in and to the same, or any part thereof," and empowered such persons to convey the interest of the persons in remainder or under disability, as well as their own interest in the land; and provided that the quantity of land to be purchased by virtue of that Act should not exceed three acres in the whole. By sect. 18 the churchwardens and trustees were empowered to raise money for the purchase of land for the purposes of the Act, by rates. The Act contained no provisions as to burial fees.

The trustees, under the Act, made some addition to the then existing churchyard, and purchased an additional burial-ground at or near *Park Street, Birmingham*. The purchase-money was provided by rates levied over the entire parish, and the land was conveyed to the rector and churchwardens, and the rector continued to receive the same fees for burials there as he had received for burials in the old churchyard.

Under the provisions of two Acts of Parliament, passed in 1846, which incorporated the *Lands Clauses Consolidation Act*, the *London and North Western Railway Company* took a portion of the *Park Street* burial-ground, and paid the purchase and compensation money, amounting to £2210 13*s.* 8*d.*, into Court; and by an order of the Court, made on the 2nd of November, 1849, upon a Petition of the then rector and churchwardens of the parish, the fund in Court was directed to be invested, and the income paid to the rector and churchwardens, to be applied by them for the purposes of the Act of 47 Geo. 3, c. 15. The money was accordingly invested in £2345 11*s.* Reduced Annuities, and as there were no

existing purposes of the Act of 1807, the dividends were accumulated, and now amounted to £816 9*s.* 4*d.* Reduced Annuities.

The *Park Street* burial-ground was closed for burials by an Order in Council made on the 20th of March, 1857, except in certain cases, and by a further Order it was absolutely closed from the month of July, 1859. By an Order in Council, dated the 3rd of February, 1858, the Corporation of *Birmingham* were constituted a burial board, and they provided a large cemetery outside the town, which was paid for by means of rates levied for the purpose, and the rector of *St. Martin's, Birmingham*, received burial fees on all burials in the new cemetery of parishioners of *St. Martin's*.

At the time the *Park Street* burial-ground was formed there was a building adjoining it, which was then used as a chapel of case for the parish of *St. Martin*. On the 1st of June, 1847, a district was assigned to the chapel under sect. 16 of 59 Geo. 3, c. 134, and it became *St. Bartholomew's Church*, but continued to be used as a chapel by the rector of *St. Martin's* for the funerals of his parishioners till some time after the land was taken by the railway company, when the then incumbent of *St. Bartholomew's* ceased to allow it to be so used.

The rector of *St. Martin's, Birmingham*, presented a Petition praying that the dividends on the fund in Court might be paid to him so long as it remained there. Another Petition was presented by certain inhabitants and ratepayers of the same parish, which prayed that the income of the fund in Court might be applied in keeping the *Park Street* burial-ground in repair, and in defraying the costs of pauper funerals, and that a scheme might be directed of the fund and the dividends thereon.

Mr. *Cotton*, Q.C., and Mr. *W. P. Beale*, for the rector of *St. Martin's*:—

This case differs from that of *Ex parte Rector of Liverpool* (1), in the fact that here the freehold of the burial-ground is not in the rector, but in a body of trustees; but that is immaterial, for no one but the rector ever received anything from the ground. The rector has received all the fees for burials; he is therefore, on the authority of *In re St. Pancras Burial Ground* (2), entitled to

(1) *Ante*, p. 15. (2) Law Rep. 3 Eq. 173.

V.-C. M. 1870 *Ex parte* Rector of St. Martin's, Birmingham.

the income of the fund in Court so long as it remains there. That is all he asks, and he would offer no opposition to laying out the money in land to be held on the same trusts as the old burial-ground. A trust for the inhabitants of the parish does not exclude the rector: *Reg.* v. *Abney* (1).

Mr. *Glasse*, Q.C., and Mr. *Bardswell*, for the ratepayers:—

The case is entirely distinct from that of *Ex parte Rector of Liverpool* (2). The simple question is, to find out who is entitled under the statute under which the burial-ground was bought. The matter does not come before the Court for the first time, the order of Vice-Chancellor *Shadwell*, which directs the dividends to be paid to the rector and churchwardens, and applied by them in accordance with the Act of Parliament, being still in force. The freehold is not in the rector, and the land itself is directed to be held "in trust for the inhabitants of the said parish." An order cannot be made to give the income to the rector, merely because it is not known what else can be done with it. The rector has neither legal right nor custom, and if there is any difficulty as to the disposal of the fund, the proper course is to direct a scheme. The equitable freehold being in the inhabitants, they are entitled to all the fruits which ordinarily belong to the rector from the freehold being in him: *Andrews* v. *Cawthorne* (3). In *In re St. Pancras Burial Ground* (4) all question was avoided by express statutory provision.

Mr. *Bristowe*, Q.C., and Mr. *Fellows*, for the vicar and churchwardens of *St. Bartholomew's*, which was separated from *St. Martin's* for ecclesiastical purposes, but not for rating purposes:—

There being no question as to freehold in the present case, the question of the right of the rector resolves itself into the right to receive burial fees. It is admitted that the rector has no right at Common Law to receive fees, and no custom is set up, and no statutory right is given. Therefore whatever fees the rector received in respect of the land were for reading the burial service, and he could not have insisted on doing that at the *Park Street*

(1) 23 L. J. (M. C.) 154. 18 Jan 1852 (3) Willes, 536.
(2) *Ante*, p. 15. (4) Law Rep. 3 Eq. 173.

burial-ground after *St. Bartholomew's* was made a separate district. The repair of the *Park Street* ground would be a proper application of the income, and any surplus might well be applied in reduction of the rates. The effect of *Lord Blandford's Act* (58 Geo. 3, c. 45) on the rights of the rector is shewn in *Gough* v. *Jones* (1).

Mr. *F. A. Lewin*, for six parishes separated from *St. Martin's* since the land at *Park Street* was bought.

Mr. *Daly*, for the churchwardens of *St. Martin's*.

Mr. *Macnaghten*, for the late rector, who would be entitled to a proportion of the accumulation.

Mr. *Wickens*, for the Attorney-General:—

It would be a proper course to direct a scheme to be settled in Chambers, and if it were considered that the rector had only a moral claim that would be considered in Chambers.

Mr. *Speed*, for the *London and North Western Railway Company*.

Mr. *Cotton*, in reply:—

The arguments in opposition to the claim of the rector have established no affirmative title in any one else. The present ratepayers have no rights arising out of rates paid by former ratepayers. The trust of the new ground was for burial purposes, and it was intended that the new ground should be in the same position as the old churchyard. The case is governed by *Ex parte Rector of Liverpool* (2), not because the freehold is in the rector, but because it is vested in trustees for use as a burial-ground.

SIR R. MALINS, V.C., after reading the preamble and sect. 11 of the Act of 1807, and shortly stating the general effect of the Act, continued:—

The object of the Act was to enlarge the churchyard, and to obtain a new piece of ground as near as possible to it; and the land to be acquired by means of rates was to be conveyed to the

(1) 11 W. R. 107. (2) *Ante*, p. 15.

V.-C. M. 1870

Ex parte Rector of St. Martin's, Birmingham.

rector and churchwardens in trust for the use of the inhabitants. The Act is silent as to fees for burials; I must, therefore, hold that fees from the new burial-ground were to be in the same position as fees from the old churchyard. There is no evidence as to when the land was acquired; but it must have been soon after the Act was obtained, probably in 1809. It is positively stated that all the fees, from 1809 to 1849, were received by the rector. It is argued that the Act provides that the land acquired shall be held for the use of the inhabitants; but for what use, except for providing an additional burial-ground? So that, when the land is said to be acquired for the use of the inhabitants, that means for their use for burial purposes. Consequently, the land is simply an addition to the old churchyard, in respect of which the rector formerly received fees. The rector continued to receive the fees from this addition till a new state of things arose quite unexpectedly, and the *London and North Western Railway Company* took part of this land for the construction of their line. The purchase-money was paid into Court, and, by an order of Vice-Chancellor *Shadwell*, it was directed to be applied for the purposes of the Act. No direction was made as to dividends, and there being no purposes of the Act to which they could be applied they have simply accumulated, and make part of the fund in Court. The question I have now to determine is, who is entitled to these dividends. The rector is the only person who ever received any money from the burial-ground. The parishioners had the right to take the dead there to be buried; but they never had any right to receive any money, and the rector was the only person who ever did receive any. Only last week I had a somewhat similar case before me, that of *Ex parte Rector of Liverpool* (1). In that case the rights of the parties were rather different, and, in one respect, I think, rather more unfavourable to the rector; the burial-ground having been long closed before the land was taken, and the rector having in consequence ceased to derive any income whatever from it. In that case I had to decide whether the rector or any one else was entitled to receive the dividends on the fund in Court, and I held that the rector was entitled. I have asked whether there is any intention to appeal from my decision, and as I find that there is to be no appeal, I must conclude that my

(1) *Ante*, p. 15.

decision was right. In the present case the land, at the time it was taken, was in actual use for burials, and the fact of it being taken caused a diminution in the source of a portion of the rector's income. Therefore it seems to me that he ought to receive the income arising from the money in Court, inasmuch as it represents the land which formed a previous source of income. But it is said that the ground was originally provided by money derived from rates, and therefore the ratepayers are entitled to some interest therein. It appears to me to be perfectly immaterial from what source the money was derived, but it was justly replied that, if I thought there was anything in that argument, I must return the money to the old ratepayers who contributed it, not to the persons who happen to pay rates now. Then it was said that the money might be applied to various parish purposes, such as the expense of pauper funerals or repairing the churchyard; but no reason whatever was shewn why the parties liable to these charges should be relieved out of this fund. I am at a loss to see why taking away a source of income from the rector must not be considered an important circumstance. I must, therefore, hold to the view which I expressed in *Ex parte Rector of Liverpool* (1), that the rector is the only person who has made out any title. It has been said that the ground of my former decision was that the freehold of the land was in the rector, and that in the present case the freehold is in a body of trustees; but that was not the main ground of my decision, and I should have come to the same conclusion if there had been no question of freehold. And the rector is not less the person entitled to the rents and profits of the land by reason of the fact that the legal fee is vested in three other persons, who have no right to receive any burial or other fees. But if the case is not completely covered by *Ex parte Rector of Liverpool*, it is covered by *In re St. Pancras Burial Ground* (2). There the income of the fund was directed to be divided according to the mode of division of the burial fees under the special Act. The present Act makes no disposition of burial fees, consequently the right to receive them remains fixed by the Common Law. The land has been diminished in quantity, and as the rector was entitled to all the profits of the land, he

(1) *Ante*, p. 15. (2) Law Rep. 3 Eq. 173.

V.-C. M. 1870

Ex parte Rector of St. Martin's, Birmingham.

must receive the dividends on the fund in Court so long as it remains there. The case has been fairly and properly argued, and the parties are entitled to their costs, which, so far as the railway is not bound to pay them, must be paid out of the fund.

Mr. *Cotton* said it might be questioned whether the rector of *St. Bartholomew* was entitled to appear.

The Vice-Chancellor considered that he might have his costs out of pocket.

Solicitors for the Rector and the Churchwardens of *St. Martin's:* Messrs. *Mathews & Mathews.*

Solicitors for the Ratepayers and the late Rector: Messrs. *Burton, Yeates, & Hart.*

Solicitors for the Rector of *St. Bartholomew's:* Messrs. *Fallows & Whitehead,* agents for Messrs. *Allcock & Milward, Birmingham.*

Solicitors for the Attorney-General: Messrs. *Raven & Bradley.*

Solicitors for the six other Districts: Messrs. *Allcock & Milward, Birmingham.*

HARVEY *v.* HALL.

V.-C. B.
1870
Nov. 3.

Practice—Injunction—Contempt—Motion to Commit—Amendment of Bill—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4.

An injunction, if granted upon merits, is not dissolved by amendment of the bill, though the amendment be without saving the injunction.

An order was made on a Defendant to deliver to a receiver bills and cheques, "or" to pay moneys received in respect of them. The Defendant said he delivered over the only bill in his possession, and that he had cashed the others, but did not say whether before or after the order; and then said that neglect to pay over the moneys (which he admitted he had received) was merely making a default in payment of a sum of money within the meaning of the *Debtors Act*, 1869, sect. 4 :—

Held, that the Defendant had committed a clear breach of the order, and that the *Debtors Act* had no application; and order for committal accordingly.

THIS was a motion to commit the Defendant, *Alexander Hall*, for breach of both or one of two orders made in the cause, and dated respectively the 9th of June, 1870, and the 21st of July, 1870.

The bill was filed for a dissolution of the partnership between the Plaintiff *Richard Harvey* and the Defendant, and alleged (amongst other things) that the Defendant had retained certain cheques and bills of the partnership. By the order of the 9th of June an injunction was granted until the hearing "or further order;" a receiver was ordered to be appointed, and the Defendant was ordered to deliver over all moneys, cheques, bills, notes, and partnership effects, and securities in his hands, to the receiver when appointed. The receiver was appointed; and by the order of the 21st of July, 1870, it was ordered "by consent" that the Defendant should, within four days after service of the order, deliver to the receiver the said bills and cheques, "or within the time aforesaid pay to the said receiver all moneys received by him or any person or persons on his behalf in respect of such bills or cheques."

Subsequently to the injunction writ, which was dated the 22nd day of June, 1870, the Plaintiff obtained at the Rolls the common order to amend, but without saving the injunction.

The Defendant put in his answer, dated the 22nd day of

V.-C. B. 1870 HARVEY v. HALL.

October, 1870, and therein stated, in answer to an interrogatory, as follows:—

"I admit that I have received cheques on account of the firm, . . . and, in fact, retained the same, but only those hereafter mentioned in the list hereinafter stated; and I say that until the Plaintiff, who had the key of the safe in which the bills, cheques, and other documents of the partnership were kept, refused me access thereto, I had always deposited the said bills, cheques, and other documents therein, from whence the cheques were duly transferred to the bankers to our account; but, afterwards, I admit that I retained certain cheques and bills of exchange (but no promissory notes or other negotiable instruments) belonging to the firm . . . a list of all which I subjoin, and all of which have been collected or converted into cash, with the exception of" one bill, "which my solicitor has duly handed over to the solicitors of the Plaintiff" . . . The list is as follows: (then followed a list). The Defendant proceeded:—

"Under the circumstances aforesaid I am unable to pay in the said cheques to the bankers . . . and to deposit the said bills of exchange in the safe thereof; but I admit that I am accountable in respect of the moneys I have so received in any account that may be hereafter directed by this honourable Court on the hearing of this suit, and not before; and I say that if any order at Chambers has been made, as alleged by consent, for the payment of such moneys to the receiver, . . . neither I nor my solicitor gave any authority for such consent, and I refuse to be bound thereby; and the Plaintiff will attach me at his peril, as I decline to account until there shall be a decree for an account in this suit."

Mr. *Little*, Q.C., and Mr. *Lindley*, for the motion:—

The moneys have been received by the Defendant, and not paid by him to the receiver. This is a clear contempt.

Mr. *George Lovell*, for the Defendant:—

The injunction is gone by the common order for amending the bill having been obtained without saving the injunction: *Home* v. *Watson* (1).

(1) 2 Sim. 85.

The order of the 9th of June, 1870, ought to have stated within what time the bills and cheques were to be delivered, in accordance with Rule 1 of the Gen. Ord., under the *Debtors Act*, 1869, of the 7th of January, 1870, and therefore is inoperative.

The order of the 21st of July, 1870, was in the alternative, and thus became in the result a simple order for the payment of moneys, and consequently within the *Debtors Act*, 1869, whereby the jurisdiction of the Court to commit for contempt for non-payment of money is ousted: *Hewitson* v. *Sherwin* (1). In *Thompson* v. *Dunn* (2) Lord *Hatherley* distinguishes between the cases of partners and trustees, and says: "The case of a partnership stands on a different footing, for there no use can be made of the account before the hearing."

Mr. *Little*, in reply:—

Home v. *Watson* (3) was under the old practice.

[The VICE-CHANCELLOR:—Where an injunction has been granted on the merits, it is not lost by the amendment of the bill.]

As to the *Debtors Act*, 1869, the Defendant was, as a partner, in a fiduciary capacity, and therefore came under the 3rd exception in the 4th section of that statute.

MR. BACON, V.C.:—

I think, Mr. *Little*, I need not trouble you further.

There are two orders in this cause, one of them made after hearing counsel for the Defendant, the other with his consent. By the former, which has been commented on, an injunction was ordered to the hearing or further order, a receiver was ordered to be appointed, and the Defendant was ordered to deliver over to the receiver all cheques, moneys, and effects belonging to the partnership. The second was more pointed. Some interval elapsed, during which the order directing payment over was not complied with, and then, by consent, the Defendant was ordered to do one of two things—either to deliver to the receiver the bills and cheques, or within four days to pay all moneys received by

(1) Law Rep. 10 Eq. 53. (2) Law Rep. 5 Ch. 573, 576.
(3) 2 Sim. 85.

V.-C. B. 1870 HARVEY v. HALL.

him, or by any person on his behalf, in respect of the bills and cheques.

The meaning of that must be, that, as some of the bills were current, these bills and the cheques were to be delivered over in four days; or that, if the cheques had been cashed, their proceeds were to be paid over within the same period.

By these orders the Defendant is clearly bound. The circumstance that the order is in the alternative does not alter its character in the smallest degree. The Defendant's answer puts the matter beyond the possibility of question. He says: "I admit," &c. [His Honour read the passage extracted above.] But he does not state in his answer whether they were received before the 21st of July—that is to say, whether the alternative would, at that date, have had a direct application, or whether it has only acquired it since, in which case there would have been a clear breach of the order.

The order for committal must therefore go.

The *Debtors Act*, 1869, has no application to, and has nothing to do with, the case. If the Defendant had not consented to the order, the matter would have been plain; but as he did consent, it is equally plain. The service of the order has been duly made. The disobedience to the order is clear, and has been duly proved; and the Defendant must be committed for the contempt which he himself admits.

Mr. *Little* said he preferred to take the order for the contempt in respect of the breach of the second order only.

The VICE-CHANCELLOR assented.

Solicitors for the Plaintiff: Messrs. *Lawrance, Plews, Boyer, & Baker.*

Solicitor for the Defendant: Mr. *J. Cressy Hall.*

MERCHANT TAYLORS' COMPANY *v.* ATTORNEY-GENERAL.

M. R.
1870
Nov. 3, 4, 9.

Charitable Devise—Gift for Purposes not exhausting whole Income—Surplus.

A testator devised certain houses and tenements to the Master, Wardens, and Commonalty of the *Company of Merchant Taylors*, "to this intent and upon this condition," that the Master and Wardens should every year, out of the rents, provide for twelve poor men and twelve poor women of the city of *London* certain garments of a specified price; and he directed the chamberlain and town clerk of the city of *London* to put the company in mind and see that the garments were given, and gave to them for so doing 10*s.* a piece out of the rents; and so that the whole residue of the rents the Master and Wardens should maintain and gather into a stock, and therewith repair, and if need be rebuild the tenements: and in case the Master and Wardens should be remiss and negligent in delivering the said garments, then he willed that the parson, churchwardens, and parishioners of *St. Michael's, Cornhill*, should enter upon the lands and tenements and hold the same, "to this intent and upon this condition," that they should bestow the yearly rents in and upon the garments of the twelve poor men and twelve poor women, and upon the reparation of the tenements, and the said 20*s.* to the chamberlain and town clerk. At the death of the testator the income arising from the tenements was considerably greater than was required for the charitable purposes expressed in the will, and the payment of the 20*s.* to the chamberlain and town clerk, and subsequently the income became very much greater:—

Held, that the *Merchant Taylors' Company* were not entitled to the surplus for their own benefit, but were bound to apply it for charitable purposes.

Attorney-General v. *Wax Chandlers' Company* (1) distinguished and explained.

ROBERT DONKYN, formerly a member of the *Company of Merchant Taylors*, in the city of *London*, made his will, dated the 1st of December, 1570, and the language of such will, with the spelling modernised, was as follows:—

"This is the last will and testament of *Robert Donkyn*, citizen and merchant taylor, of *London*, concerning the order, devise, and disposition of all and singular my lands, tenements, and hereditaments whatsoever they be, whereof I am seised of an estate in fee simple, situate, lying, and being within the parish of *St. Botolph Without, Bishopsgate*, of *London*, rented yearly at £26 or thereabouts, and of all other my lands, tenements, and hereditaments

(1) Law Rep. 8 Eq. 452; Ibid. 5 Ch. 503.

M. R.
1870
MERCHANT TAYLORS' COMPANY v. ATTORNEY-GENERAL.

lying elsewhere within the said city of *London*, in manner and form following (that is to say): First, all that my messuage or house, with all singular commodities and appurtenances thereto belonging, which the 9th day of October, in the year of our Lord God 1568, I purchased of the *Company of Waterbearers* in *London*, being now rented at £4 by the year, I give and devise unto the parson and churchwardens of the parish church of *St. Michael* in *Cornhill*, in *London*, for the time being, and to their successors, parson and churchwardens of the said parish church, for ever, to this intent, that the parson, churchwardens, and parishioners of the said parish, or some of them, shall, with the profits thereof, provide and give every week, weekly on the Sunday for ever, one dozen of penny bread with the wantage in the church to and amongst the poorest householders of the said parish where most need shall appear, and 2 shillings of the rest of the rent I give to the churchwardens for their pains, and the whole rest of the rent I will shall be reserved to the maintenance of the reparations of the said house. Item: I give and devise all my lands, tenements, and gardens, with their appurtenances, in the said parish of *St. Botolph*, called or known by the name of *Bell Alley*, unto the Master, Wardens, and Commonalty of the *Company Mystery of Merchant Taylors*, in the city of *London*, and to their successors, for ever, to this intent and upon this condition, that they the said Master and Wardens of the said company, or some of them, and their successors, shall yearly, every year, for ever, of and with the rents and profits of the said lands, tenements, and gardens in the said parish of *St. Botolph Without, Bishopsgate*, aforesaid, provide, buy, and give, or cause to be provided and given, unto 12 poor men inhabiting within the city of *London*, being of honest fame and name, such as they shall think thereof to have most need, without favour or affection, the number of 12 gowns of Welsh frieze of the price of 16 pence the yard, 12 shirts of the value of 2 shillings each shirt, and 12 pair of shoes of 12 pence the pair (that is to say): to each poor man one frieze gown, one shirt, and one pair of shoes, and that there be 7 yards of the same frieze to each such gown; and so that they do also provide, buy, and give, or cause to be provided and given yearly for ever, of and with the rents and profits of the same lands, tenements, and gardens, unto 12 poor women of honest conver-

sation and in good name and fame, such as they the said Master and Wardens shall think to have most need thereof, without favour or affection, the number of 12 cassocks of like frieze and of like price, and also 12 smocks of 20 pence the piece, and 12 pair of shoes of 12 pence the pair, that is, to each of those 12 poor women one cassock of frieze, one smock, and one pair of shoes, and that there be 5 yards and a half of the same to every such cassock; and that the said 12 gowns and 12 cassocks be delivered yearly to the said number of poor men and women, ready made, together with the shirts, smocks, and shoes afore appointed at the Feast of the Birth of our Lord God, without any further delay; and to the intent that the said 12 poor men's gowns, with their shirts and shoes, and 12 poor women's cassocks, with their smocks and shoes, may be the better seen, performed, and delivered, according to my mind and intent, and the condition in that behalf appointed for ever, I do instantly herein require and pray the chamberlain of the city of *London*, and the town clerk of the same City for the time being, and their successors, that they will yearly, at the Feast of All Saints, call upon and put in mind the said Master and Wardens of the said *Company of Merchant Taylors*, and look that the said 12 poor men's gowns and their shirts and shoes, and 12 poor women's cassocks and their smocks and shoes, be justly and truly given and yearly bestowed according to my mind and devise in this my present testament before declared: and I give to the same chamberlain and town clerk, and their successors, chamberlain and town clerk of the said City for the time being, for ever, for their labour and pains to be taken in that behalf, 10 shillings a piece yearly for ever at the Feast of Christmas, to be received at the hands of the Master and Wardens of the said *Company of Merchant Taylors* out of the issues, rents, and profits of the said lands, tenements, and gardens in the said parish of *St. Botolph;* and so that the whole residue of the said rents and profits of the said lands, tenements, and gardens, they do maintain and gather yearly into an whole stock, and therewith do and keep the reparations of the said tenements to them devised, and if need be new build the same as to their discretions need shall appear, as the same stock will fall out: and in case the said Master and Wardens of the said *Company of Merchant Taylors* for the time being shall be remiss and negligent

M. R.
1870
MERCHANT TAYLORS' COMPANY v. ATTORNEY-GENERAL.

in performing and delivering the said 12 poor men's gowns and their said 12 shirts and 12 pair of shoes, and the said 12 poor women's cassocks and their 12 smocks and 12 pair of shoes before appointed according to the purport hereof, and my true meaning in this my testament declared that then as now and now as then I will that the said parson, churchwardens, and parishioners of the said parish church of *St. Michael-upon-Cornhill* aforesaid shall enter upon the same lands, tenements, and gardens before to the said *Company of Merchant Taylors* appointed, and the same shall hold to them and their successors, parson, churchwardens, and parishioners of the parish church aforesaid for ever, to this intent and upon condition that they the said churchwardens and their successors shall bestow the yearly rents and profits of the said lands, tenements, and gardens in and upon the said 12 poor men's gowns and 12 poor women's cassocks, and upon their shirts, smocks, and shoes before appointed to be given, and upon the reparations of the same tenements and gardens, and the said 20 shillings to the chamberlain and town clerk of the same City for the time being yearly, putting the said churchwardens and parishioners of *St. Michael's* aforesaid in mind of the conditions before expressed."

The testator died shortly after the date of his will.

The sums charged by the will on the hereditaments devised to the Plaintiffs amounted to £14 8*s.*, to which was to be added the sum of £1 or thereabout for the cost of making up the gowns and cassocks in the will mentioned.

From the accounts commenced to be kept by the Plaintiffs shortly after the testator's decease, it appeared that the income derived from the said hereditaments in the year 1571–72 was £24 18*s.*, and that the payments in respect of the charges amounted in that year to £15 7*s.* In addition to such payments, a contribution was made from time to time out of the rents and profits of the said devised hereditaments toward the reparation of the buildings forming part thereof, and of other buildings in the city of *London* also vested in the Plaintiffs. The amount of such contribution was, however, not nearly sufficient to exhaust the residue of the rents and profits of the devised hereditaments. Since the death of the testator, the annual income of the property had very largely increased. From the death of the testator down

to Christmas, 1862, the Plaintiffs never doubted that they were absolutely entitled to the surplus rents of the devised hereditaments, and accordingly they carried such surplus to the credit of their corporate account. In the early part of 1863, however, the Charity Commissioners raised a question whether the Plaintiffs were entitled to take such surplus for their own use, and suggested that the same was applicable to charitable purposes, and ought to be accounted for to them. Since that time the Plaintiffs had invested and accumulated such surplus, and accounted for the same to the Charity Commissioners.

The Plaintiffs now filed a bill against the Attorney-General, containing allegations to the effect hereinbefore stated, and praying for a declaration that the Plaintiffs were entitled for their own use to the clear surplus income of the devised property, and the accumulations thereof, subject only to their making such specific payments thereout as in the will mentioned.

The Attorney-General demurred.

Mr. *Jessel*, Q.C., and Mr. *Wickens*, for the demurrer:—

The Plaintiffs will, no doubt, rely on the recent case of *Attorney-General* v. *Wax Chandlers' Company* (1); but we say that the present case is distinguishable on the following grounds:—First, the gift over here is to the parson and churchwardens of *St. Michael's, Cornhill*, who cannot take beneficially. In the case of the *Wax Chandlers' Company* the gift over was to the next of kin of the testator. Moreover, the parson and churchwardens are expressly directed to hold what they take in exactly the same manner as the *Merchant Taylors' Company*. Secondly, there is no expression of intention to benefit the Plaintiffs, such as there was in the will which was the subject of litigation in *Attorney-General* v. *Wax Chandlers' Company*. Thirdly, the Court came to the conclusion that the intention of the testator in that case was to give the lands to the *Wax Chandlers' Company* upon condition of their paying a certain sum annually to charitable purposes; and consequently, when the *Wax Chandlers' Company* accepted the gift, they were bound ever afterwards to pay this annual sum, even although the annual income might not amount to so much. Here

(1) Law Rep. 8 Eq. 452; Ibid. 5 Ch. 503.

M. R.
1870
MERCHANT TAYLORS' COMPANY v. ATTORNEY-GENERAL.

there is a plain gift upon trust, not upon condition; the company are required, after making the charitable payments, to accumulate the "whole residue," and apply the accumulations, as required, in repairing and rebuilding the devised tenements.

Our argument is much supported when regard is had to the previous gift in the same will to *St. Michael's, Cornhill.*

The law on the subject is accurately laid down by Lord Justice *Turner* in the case of *Attorney-General* v. *Corporation of Beverley* (1). He says: "It is now well settled that if the whole amount of the rents and profits of an estate, as they stand at the time, be given to a charity, the charity is entitled to the benefit of any increase in those rents and profits, the disposition of the whole rents and profits being considered to amount to a disposition of the estate; and (although I am aware of no case to that effect) I presume that the same rule would be applied if a portion of the rents and profits, not given to a charity, be wholly dedicated to the exoneration of the portion of the rents, which is so given, from burdens which would otherwise fall upon it."

In the case of *Attorney-General* v. *Wax Chandlers' Company* (2), it was contended that, where a portion of the rents was devised to a charity, and the surplus was directed to be applied in repairs, the whole was given to charity. That can no longer be argued; but the case cited shews that, *primâ facie*, such a gift is a gift of the whole to charity, and that it requires something in the will to get rid of the *primâ facie* meaning of the words. Here there is nothing of the kind; on the contrary, the whole context shews that the *primâ facie* meaning is the true one.

Sir *Roundell Palmer*, Q.C., Sir *R. Baggallay*, Q.C., and Mr. *Cookson*, for the bill:—

We say that the case is governed by *Attorney-General* v. *Wax Chandlers' Company.*

First, it is said that the gift over is to the parson and churchwardens of *St. Michael's*, who cannot take beneficially; but that remark, however true, does not affect the construction of the previous gift. The Plaintiffs, as we contend, are to take for themselves whatever is not required for the charitable purposes pointed

(1) 6 D. M. & G. 256, 265. (2) Law Rep. 8 Eq. 452; Ibid. 5 Ch. 503.

out by the testator; and in like manner the parson and churchwardens will take under the gift over, not for themselves, but for the parishioners whom they represent, whatever is not required for such purposes. The case of *Attorney-General* v. *Wax Chandlers' Company* (1) decides that a dedication of a fund for the repair of tenements, the rents of which are partly devised to a charity, is not a charitable gift. That being so, the Plaintiffs are entitled to whatever is not wanted for the charity, until a forfeiture occurs; and when that occurs, the parson and churchwardens will take the same surplus, not for the charitable purposes pointed out by the testator, but for the general purposes of the parish.

Next, it is said that there is no expression of intention to benefit the Plaintiffs. In the case of the *Wax Chandlers' Company* there was a gift to the officers of the company; and it was there asked whether it could be supposed that these officers were intended to have a benefit, while the company, to whom the gift was made, and who would have all the trouble of administering it, were to have nothing. That remark applies here *à fortiori;* for while the testator provides carefully for the remuneration of the town clerk and chamberlain of the city of *London*, and churchwardens, he gives nothing to the Plaintiffs or their officers, unless they take the surplus.

Thirdly, it is said that the gift to the *Wax Chandlers' Company* was upon condition, while here it is upon trust. But the words employed by the testators in the two cases are almost identical. In *Attorney-General* v. *Wax Chandlers' Company*, the company were to have the rents "for this intent and purpose, and upon this condition," that they should yearly distribute £8; and the "rest" of the rents and profits was to be bestowed upon repairs. Here property is given to the Plaintiffs "to this intent and upon this condition," that out of the rents they should provide certain things, and so that the "whole residue" be applied towards rebuilding and repairs. It is wholly immaterial whether the duty imposed is to be performed out of the rents or by a gift of sums wholly independent of the rents.

[They referred to *Thetford School Case* (2); *Mayor of Beverley* v. *Attorney-General* (3); *Mayor of Southmolton* v. *Attorney-*

(1) Law Rep. 5 Ch. 503. (2) 8 Rep. 130 b. (3) 6 H. L. C. 310.

M. R. 1870

MERCHANT TAYLORS' COMPANY v. ATTORNEY-GENERAL.

General (1); *Attorney-General* v. *Mayor of Bristol* (2); *Attorney-General* v. *Dean and Canons of Windsor* (3).]

Mr. *Jessel*, in reply.

Nov. 9. LORD ROMILLY, M.R.:—

In this case it seems to me that the only question is, whether it is governed by the case of the *Wax Chandlers' Company*. Having considered the very able arguments which have been addressed to me, I am of opinion that, although the case of the *Wax Chandlers' Company* was correctly decided, if I may be permitted to say so, both by the Lord Chancellor and myself, the present case is quite distinct from it, and that upon the very principle upon which the *Wax Chandlers'* case was determined, the interest given to the Plaintiffs cannot be held to be an absolute interest.

It is necessary that I should state a little in detail my view of the reasons for these different decisions, because it is important to be understood that it was not intended by me, and if I may venture so to say, by the Lord Chancellor, in the *Wax Chandlers'* case, to unsettle any previous decisions, or to determine anything which had not been previously determined. The principle to which I referred in the *Wax Chandlers'* case (4) was this: I said, "Here is a will, upon which you must ascertain whether the property is given in trust to charity, or whether it is given upon condition of paying certain sums for the benefit of the charity. If it is given in trust for the charity, then the charity takes the whole, with all the accumulations. If it is given to a person upon condition that he gives something to a charity, which does not necessarily exhaust the whole of the income of the property, then there is a gift to the devisee, and he takes the surplus."

I entirely assent to the view which was taken by Lord Justice *Turner* in the passage which was cited. It is proper to observe that, if a person gives in any will certain property to a company in trust, to apply the rents of that property (which means all the

(1) 5 H. L. C. 1.
(2) 2 Jac. & W. 294.
(3) 8 H. L. C. 369.
(4) Law Rep. 8 Eq. 452.

rents of that property) to a certain charity, and if that charity does not exhaust the whole of it, the property is given to charitable purposes, and the remainder must be applied to charitable purposes, either *cy-près* for the extension of that charity itself, or, if that fails, and it cannot be so applied, then it being all given to a charity, it must be assigned by the sign manual or the like to certain charitable purposes.

Now this, I think, is very clearly the nature of the gift in the present case. In the first place, it is to be observed that there is here no gift to anybody of any beneficial interest, which there was in the *Wax Chandlers'* case. The testator begins by giving certain property at once to "the parson and churchwardens of the parish church of *St. Michael* in *Cornhill*, in *London*, for the time being, to this intent, that the parson, churchwardens, and parishioners of the said parish, or some of them, shall, with the profits thereof, provide and give every week, weekly, on the Sunday, for ever, one dozen of penny bread, with the wantage in the church, to and among the poorest householders of the said parish, where most need shall appear; and 2 shillings of the rest of the rent I give to the churchwardens for their pains, and the whole rest of the rent I will shall be reserved to the maintenance of the reparations of the said house." As it was very properly argued, nobody can dispute, nor has it been otherwise contended, that with respect to this gift the whole of it was given to charity: it was a distinct and clear gift of the whole to charity. It says that the rents are to be so applied, and even if the repairs do not take the whole of the remainder of the rents, yet the property is given to charity. It may be a question how that surplus is to be applied; but this is certain, that the churchwardens and parishioners cannot themselves take the benefit of it personally.

Then comes the next gift, and it resembles the first very much. The testator gives all his lands in *Bell Alley* to "the Master, Wardens, and Commonalty of the *Company* or *Mystery of Merchant Taylors* in the city of *London*, to this intent and upon this condition," (that makes it important to see whether what follows really is a condition or a trust) "that they the said Master and Wardens of the said company, or some of them, and their successors, shall yearly, every year, for ever, and with the rents and

M. R.
1870
MERCHANT TAYLORS' COMPANY v. ATTORNEY-GENERAL.

profits of the said lands, tenements, and gardens in the said parish of *St. Botolph Without, Bishopsgate*, aforesaid, provide, buy, and give, or cause to be provided and given, unto 12 poor men 12 gowns," and so on, specifying certain things; and then he proceeds: "and to the intent that the said 12 poor men's gowns, with their shirts and shoes, and 12 poor womens' cassocks, with their smocks and shoes, may be the better seen performed and delivered according to my mind and intent, and the condition in that behalf appointed for ever, I do instantly herein require and pray the chamberlain of the city of *London*, and the town clerk of the same City for the time being, that they will yearly, at the Feast of All Saints, call upon and put in mind the said Master and Wardens of the said *Company of Merchant Taylors*, and look that this is done; and I give to the said chamberlain and town clerk for the time being for ever, for their labour and pains to be taken in that behalf, 10 shillings a piece yearly for ever at the Feast of Christmas, to be received at the hands of the Master and Wardens of the said *Company of Merchant Taylors* out of the issues, rents, and profits of the said lands, tenements, and gardens in the said parish of *St. Botolph*, and so that the whole residue of the said rents and profits of the said lands, tenements, and gardens they do maintain and gather yearly into a whole stock, and therewith do and keep the reparations of the said tenements to them devised, and, if need be, rebuild the same as to their discretions need shall appear as the same stock will fall out." It is expressly stated that the whole of the rents are to be so applied. There is first the gift to provide these gowns and other articles out of the rents, then they are to pay the chamberlain and town clerk of the city of *London*, who are to see that they perform the trust, the sum of 10*s.* cash out of the rents, and the whole of the remainder of the rents are to be accumulated into a stock to be applied in repair of the property, and also, if necessary, rebuilding. So that there is an express trust of every penny of the rents so received, and although the words "upon this condition" are used, the condition simply is, that they so apply the whole of the produce of the property so given to them.

Now this is a matter of extreme importance to be observed, that if the rents should fall short, the *Merchant Taylors' Company* are

not bound to pay anything out of their own pocket; they are only bound to apply the rents, and if from any cause whatever the rents should happen to be diminished to one half, then they are only to do what the rents will enable them to do, and nothing further. In the *Wax Chandlers'* case it was just the contrary; there the company were obliged to pay a certain sum whether the rents were sufficient or not: that was an obligation imposed on their taking the property. Before I refer to that, I will notice the gift over in the present case. The gift over here is, that if the *Merchant Taylors' Company* fail in doing what the testator prescribes, then it is desired that "the parson, churchwardens, and parishioners of the said parish church of *St. Michael-upon-Cornhill* shall enter upon the property, and the same shall hold to them to this intent and upon condition that they" shall do exactly the things which are before mentioned: that they shall bestow the yearly rents and profits upon the charitable purposes, and that the chamberlain and town clerk shall also have 20*s.* for seeing that this duty is performed; so that I find, properly speaking, no condition at all: it is nothing more than a gift of the rents and profits of the property, which are to be applied for certain charitable objects, and nothing else.

Now observe what was the state of things in the *Wax Chandlers'* case. In the first place, the whole of the property is given there to the testator's relations. The will begins by so giving it. The property in question is given to *William Kendall*, the testator's son, and to the heirs of his body lawfully begotten, so that he had the absolute power of controlling the whole if he thought fit. It was an estate tail; he might have suffered a recovery and have obtained the whole of the property: "And for default of such issue I will that the Master, Wardens, and Commonalty of the *Mystery of the Wax Chandlers* of the city of *London*, and their successors, shall have the said howsinges and tenements for this intent and purpose, and upon this condition." Now, here the words are exactly the same as in the present case of the *Merchant Taylors' Company*, except that, upon looking further into the will, in the case of the *Merchant Taylors' Company* it is evident that the condition is nothing, but that the intent and purpose are everything; while in the *Wax Chandlers'* case the intent and purpose disappear,

M. R.
1870
MERCHANT TAYLORS' COMPANY v. ATTORNEY-GENERAL.

and it is the condition which becomes the important thing, "upon this condition, that they shall yearly distribute £8 of lawful money of *England* after this manner, that is to say"—that is to say, they must pay £8, whether they take it out of the rest of their property or not, provided they accept this devise. They are not obliged to accept this devise, but if they take it they must pay the £8. It is true there is a passage which is a strong indication that the testator himself believed that the rents of the property would be so applied, for the will says that out of the rest of the rents they are to provide for the reparation of the building; he does not say to rebuild, nor does he desire them to make an accumulated fund, as in the case now under consideration; but they are to repair the building. The words are, "and the rest of the profits of the said houses and tenements I will shall be bestowed upon the reparations of the said houses and tenements." In the present case it is expressly stated that the whole must be so applied: in the former case it was upon condition to pay £8, and that the rest of the rents shall be applied in the repair of the building. I am of opinion that that merely meant as far as it was necessary, and that it amounts to a condition to repair the building. The Lord Chancellor expressly takes that view of the case, and puts it as a gift upon condition. This view is made the more strong because it is obvious that, when the property is given over in the event of the conditions not being fulfilled, the persons who took it under this gift took a beneficial interest in it, and there the words "intent and purpose" are omitted: it is expressly given to the next of kin "upon condition," and upon condition alone. The words are these: "And if the Master, Wardens, and Commonalty of the *Mystery of Wax Chandlers* of *London*, and their successors, shall leave any of these things undone above rehearsed, then I will that the next of kindred unto me, the said *William*, shall enter into the said tenements, and them have and hold unto him and unto his heirs for ever, upon condition that he and they and every of them do all these things above rehearsed in all points as it is above rehearsed by me, *William Kendall*." The obvious thing there is that the gift over is an absolute gift in fee simple upon condition; and, as I stated in the former judgment, I was of opinion that it was given to the next of kin to take it in the same manner as the *Wax*

Chandlers' Company took it, only to take very good care that the conditions were performed.

Therefore I repeat that the question in these wills, and in wills of this description, is this: Is the property given to the company in trust, to apply the rents in the form of charity, or is the property given to the company upon condition that they pay a certain sum and do certain things? If it is upon condition, then if they perform the condition they take the residue of the property for their own use, and if not, the whole thing is given in trust. Now that, I think, involves the same question as was involved in the *Thetford School Case* (1), and in all other cases upon the subject. The principle, I take it, which was laid down in the *Thetford School Case*, was this, that when a property was given to a company, and it was directed that out of the rents they should make certain payments, and nothing was said about the surplus, and then it appeared that there was a surplus, that surplus was for the benefit of the company, and the company was entitled to take it, and also any increase. But if the testator, perceiving that the whole of the rents of the property are not exactly exhausted by his gifts, directs that the balance is to be applied in a certain manner, then the parties must take the increase in aliquot proportion, each taking his share. Here the whole is given, and is given in trust; and the whole must be so applied.

I a little regret this suit, because it is obvious that what unquestionably was my intention in the case of the *Wax Chandlers' Company*, and what, I think, was the intention of the Lord Chancellor, has not been duly understood. I am of opinion that the decision in that case does not govern the present, that this property was all given to charity, and that the demurrer of the Attorney-General must be allowed. But I think that it was desirable this question should be settled, and that the costs of the determination of it should come out of the estate.

Solicitors: Mr. *Samuel Fisher;* Messrs. *Raven & Bradley.*

(1) 8 Rep. 130 b.

M. R.

1870

Nov. 10, 22.

HOBGEN *v.* NEALE.

Will—Substituted Gift to Issue—Time when Class to be ascertained—Joint Tenants.

Bequest to testator's wife for life, and afterwards equally between all his brothers and sisters, namely, *M.*, *E.*, *T.*, *S.*, and *F.*; but in case any of them should die leaving issue, then the part or share of him, her, or them so dying should go to his or their respective issue.

The testator died in 1842, and his widow in 1868. None of the brothers and sisters survived her. *E.* and *F.* predeceased the testator, leaving children and remoter issue, of whom some were born before and some after the death of the testator, and some died in the widow's lifetime. *M.* survived the testator, and died leaving children; *T.* survived the testator, and died without issue; *S.* survived the testator, and left one child:—

Held, that the word "issue" was to be taken in its largest sense:

Held, also, that the class of issue of *E.* and *F.* were to be ascertained at the testator's death, and the class of issue of *M.* at *M.'s* death, and that in each case the issue were entitled to the parent's one-fifth share *per capita*, as joint tenants; also that the representative of *T.* and the only child of *S.* were each entitled to one-fifth share.

Ive v. *King* (1) followed.

WILLIAM SHOTTER, the testator in the cause, by his will gave his residuary estate upon trust for his wife for her life, and after her decease he directed his trustees to sell the same and to divide the proceeds in manner following: "Unto and equally between all my brothers and sisters, namely, *Mary West Neale*, *Elizabeth Neale*, *Thomas Shotter*, *Sophia Sanders*, and *Francis Shotter*; but in case any or either of my said brothers and sisters shall depart this life leaving lawful issue of his, her, or their bodies, then I direct that the part or share, parts or shares of him, her, or them so dying shall go and be paid to his, her, and their respective issue."

The testator died in 1842, leaving his wife surviving, who died in 1868.

Mary West Neale survived the testator, and died in the lifetime of his widow, leaving eight children her surviving, all of whom were living at the death of the testator.

Elizabeth Neale died in the lifetime of the testator, leaving four children her surviving, all of whom were living at the testator's death, and two of whom predeceased the widow.

(1) 16 Beav. 46.

Thomas Shotter survived the testator, and died in the lifetime of his widow, without leaving any child: he had made a will, one of the executors of which was surviving.

Sophia Sanders survived the testator, and died in the lifetime of the widow, leaving one child, who was still surviving.

Francis Shotter died in the lifetime of the testator, leaving several children, all of whom survived the testator; some died in the lifetime of the widow and some survived her. There were grandchildren of *Francis Shotter* born after the testator's death, some of whom survived their parents and survived the widow.

The suit was instituted by one of the two surviving children of *Elizabeth Neale* and her husband, as Plaintiffs, against the Defendant, the surviving trustee and executor, for the administration of the testator's estate.

The cause now came before the Court on further consideration; and the question was, who were now entitled, in the events that had happened, to the respective shares of the deceased brothers and sisters of the testator.

Sir *R. Baggallay*, Q.C., and Mr. *Woodroffe*, for the Plaintiffs:—

In this case there is a gift to the testator's brothers and sisters *nominatim*, with a substituted gift, in case any of them should die leaving issue, of the part or share of him, her, or them so dying, to his, her, or their respective issue. The word "issue" is here to be taken in its largest sense, there being nothing to restrict it, and therefore the grandchildren of a deceased legatee will be entitled equally with the children.

The next question is, at what time, as regards each of the brothers and sisters of the testator who has died leaving issue, is the class of issue to be ascertained.

The case is very similar to that of *Ive* v. *King* (1), where there was a bequest to the testator's widow for life, with remainder to five persons *nominatim*; and a proviso that, in case of the death of any of them before the testator's wife, then their shares were to go to their respective children.

Your Lordship there held that, in the case of a legatee living at the date of the will, but dying before the testator, his children took

(1) 16 Beav. 46.

BIBL. LOCMIN

M. R. 1870 HODGEN v. NEALE.

his share, and the class was to be ascertained at the death of the testator; and that, in the case of a legatee who survived the testator and died in the lifetime of the tenant for life, the class was to be ascertained at the death of the legatee.

Here the gift is to the five brothers and sisters of the testator as a class; and we submit that, notwithstanding the decision in *Ive* v. *King* (1), the death of the tenant for life is the time when the class of issue of *Elizabeth Neale*, who died before the testator, is to be ascertained. But if, following the decision in *Ive* v. *King*, your Lordship holds that the death of the testator is the time when the class of issue is to be ascertained, then they can only take as joint tenants: *In re Hodgson's Trusts* (2).

The result will be that the four children of *Elizabeth Neale* living at the testator's death became entitled to their mother's one-fifth share as joint tenants, to the exclusion of any after-born issue, and that the two who survive are now entitled.

Mr. *H. C. Ward*, for the Defendant.

Mr. *Winterbotham*, for the executor of *Thomas Shotter*, contended that he was entitled to his one-fifth share.

Mr. *Freeman*, for the only child of *Sophia Sanders*, contended that he was entitled to her one-fifth share.

Mr. *Phear*, for some of the children of *Francis Shotter*:—

The class of issue must, in this case, be ascertained at the death of the testator, and all the children then living became entitled to vested interests in the one-fifth share of their deceased parent. The word "issue" must here be taken in its limited sense, to the exclusion of grandchildren: *Macgregor* v. *Macgregor* (3).

Mr. *Bedwell*, for the children of deceased children of *Francis Shotter* born after the testator's death:—

The word "issue" here includes grandchildren, who are to take in substitution for their parents, though not in competition with them: *Robinson* v. *Sykes* (4); *Davenport* v. *Hanbury* (5); *Maddock* v. *Legg* (6). If *Ive* v. *King* is not followed, and the death of the

(1) 16 Beav. 46.
(2) 1 K. & J. 178.
(3) 1 D. F. & J. 63.
(4) 23 Beav. 40.
(5) 3 Ves. 257.
(6) 25 Beav. 531.

tenant for life is the time for ascertaining the class of issue, then the after-born grandchildren of *Francis Shotter* will be entitled.

Mr. *Southgate*, Q.C., and Mr. *Graham Hastings*, for the children of *Mary West Neale*.

Nov. 22. LORD ROMILLY, M.R.:—

This is a question upon the construction of a will, and I have been asked to reconsider my own decision in *Ive* v. *King* (1). I have gone through the matter very fully and carefully, and I have looked at the various authorities, and I cannot find that *Ive* v. *King* has been dissented from by any authority; and on reconsidering that case I think it is right, and I propose to follow it for the reasons which I there stated. I will now state how it is to be applied to the present case.

The testator left his property to his five brothers and sisters, and proceeded as follows: "In case any or either of my said brothers and sisters shall depart this life leaving lawful issue of his, her, or their bodies, then I direct that the part or share, parts or shares of him, her, or them so dying shall go to and be paid to his, her, and their respective issue." This, with the exception of the gift over, and the use of the word "issue" instead of "children," is exactly the same as *Ive* v. *King*. The testator made his will in December, 1838, when the three sisters and the two brothers were all alive. He died in 1842, but before his death *Elizabeth* and *Francis* had died leaving issue. Then, according to *Ive* v. *King*, if he had used the word "children," I am of opinion that the class of children would be ascertained at the death of the testator. He has used the word "issue," and I am of opinion that I can make no distinction between the word "issue" and the word "children." He has used the word "issue" here in the largest sense, and there being in the will nothing about issue taking the parent's share or the like, he must be taken to have meant issue generally, and I think all the issue of *Elizabeth* and of *Francis* must be ascertained

(1) 16 Beav. 46.

M. R. 1870 HOBGEN v. NEALE.

at the death of the testator, and that all such issue, whether children, grandchildren, or great-grandchildren, then became entitled *per capita* to the share which *Elizabeth* would have taken in the one case and *Francis* in the other as joint tenants, as in the case of *In re Hodgson's Trusts* (1).

Applying the principle of *Ive* v. *King* (2) to the other shares, I find that after the death of the testator, and before the death of the tenant for life, the three other brothers and sisters died. *Thomas* died without any children, but I am of opinion that he was entitled to a share, to which his legal personal representative is now entitled. *Sophia Sanders* left only one child, and that child had no children. All her issue then consisted of one child, who therefore became entitled to a vested interest in his mother's one-fifth share, subject to the life interest of the testator's widow.

As regards the share of *Mary West Neale*, who died after the testator and before the death of his widow, the class of issue must be ascertained at the time of the death of the legatee, and all the issue then living must be declared to be entitled as joint tenants.

MINUTES:—Declare that, as regards the shares of *Elizabeth Neale* and *Francis Shotter* (who both predeceased the testator), their respective issue living at the death of the testator became entitled *per capita* to such shares respectively as joint tenants; and that, as regards the shares of *Sophia Sanders* and *Mary West Neale* (who survived the testator), their respective issue living at their respective deaths became entitled *per capita* to such shares respectively as joint tenants; and that, as regards the share bequeathed to *Thomas Shotter*, his legal personal representative is entitled thereto.

Solicitors: Messrs. *Robinson & Preston*, agents for Messrs. *Johnson & Raper, Chichester;* Messrs. *Rogerson & Ford;* Messrs. *Palmer, Palmer, & Bull*, agents for Mr. *G. F. Mant, Storrington.*

(1) 1 K. & J. 178. (2) 16 Beav. 46.

PILCHER *v.* RAWLINS.
JOYCE *v.* RAWLINS.

M. R.
1870
Nov. 4, 7, 9;
Dec. 5.

Breach of Trust—Investment on Mortgage—Release of Part of Mortgaged Property—Notice—Purchase for Value—Legal Estate.

A plea of purchase for value without notice cannot be supported if a deed or document under which the purchaser derives his title gives constructive notice of the title of the adverse claimant; and this holds even if such deed or document has been concealed from the purchaser.

In 1851 a mortgage of real estate was made to three persons, the mortgage deed disclosing the fact that the mortgage-money was held by the mortgagees upon trust. In 1856 the mortgagor induced the survivor of the three trustee mortgagees, in breach of his duty as trustee, to execute a reconveyance of part of the mortgaged property of such a character as to put any one who saw it upon inquiry which would have disclosed the breach of trust. The mortgagor then made a fresh mortgage to other persons, from whom he concealed the existence both of the mortgage of 1851 and the reconveyance:—

Held, that the mortgagees of 1856 could not claim the benefit of the legal estate which passed by the reconveyance without admitting that they had notice of the mortgage of 1851, and of the trusts upon which the mortgage-money was held; and could not set up the defence of purchaser without notice against the persons beneficially interested in the mortgage of 1851.

The mortgagor executed a deed purporting to convey to the surviving trustee another part of the property, in consideration of a sum of money not actually paid, but the receipt for which was indorsed. This conveyance did not refer to the mortgage of 1851:—

Held, that a subsequent mortgagee from the surviving trustee could not set up the defence of purchaser without notice against the person beneficially interested in the mortgage of 1851, although this mortgage had been concealed from him.

Carter v. *Carter* (1) followed and approved.

IN 1830 *Jeremiah Pilcher*, being about to marry a second time, executed two settlements of personal estate. Both bore date the 23rd of August, 1830. One was intended to make a provision for his children by his first marriage, and the other for his intended wife and his issue by her. The trustees of the former settlement were the three brothers of the settlor, *John Giles Pilcher* (who died on the 30th of March, 1852), *George Pilcher* (who died on the 7th of November, 1853), and *William Humphrey Pilcher* (who died

(1) 3 K. & J. 617.

M. R. 1870 PILCHER v. RAWLINS. — JOYCE v. RAWLINS.

on the 5th of November, 1865, after the institution of these suits). The trusts were for the benefit of *Jeremiah Pilcher* during his life, and after his death for the benefit of the children of his first marriage and their issue; and there was a power enabling the trustees to vary the investments of the trust funds with the consent in writing of *Jeremiah Pilcher* during his life. The trustees of the latter settlement were *Francis Joyce* (Plaintiff in the second suit), *Hugh Jackson* (who died some time previously to 1854), and *William Humphrey Pilcher*. The trusts were for the benefit of *Jeremiah Pilcher* and his intended wife successively during their respective lives, and after the decease of the survivor of them for the benefit of the children of the marriage; and the trustees had power to vary the investments of the trust funds with the consent of the tenant for life for the time being. Both settlements contained the usual trustees' receipt clause.

The object of the suits was to enforce certain securities on which the funds subject to the trusts of the two settlements of the 23rd of August, 1830, had been invested, and to make one *Robert Rawlins* and the said *William Humphrey Pilcher* (or his estate) liable for any loss occasioned by certain dealings with the property comprised in the securities. The first suit related to the funds subject to the trusts of the first of the two settlements, and the Plaintiffs in it were *Jeremiah Pilcher* and the children of his first marriage. The second suit related to the funds subject to the trusts of the second of the settlements, and the Plaintiffs in it were *Francis Joyce* (the trustee), *Jeremiah Pilcher*, and his wife and their children. *Jeremiah Pilcher* died while the suits were pending, his wife having predeceased him.

The facts material for the purposes of this report were shortly as follows: In 1851, £8373 7*s.* 11*d.*, being the whole of the fund subject to the trusts of the first settlement, was advanced to *Robert Rawlins* on the security of a mortgage of real estate belonging to him. The mortgage bore date the 23rd of April, 1851, and was expressed to be made between *Robert Rawlins* of the first part, *John Giles Pilcher*, *William Humphrey Pilcher*, and *George Pilcher* of the second part, and *Jeremiah Pilcher* of the third part, and contained a recital that *Rawlins*, having occasion for the sum of £8373 7*s.* 11*d.*, had applied to *John Giles Pilcher*, *William*

Humphrey Pilcher, and *George Pilcher* to lend and advance the same, which (the same being trust money) they, with the consent and approbation of *Jeremiah Pilcher*, testified as therein mentioned, had agreed to do. The property was made redeemable on repayment of the principal, with interest, on the 23rd of April, 1856, to the trustees or the survivors or survivor of them. The deed contained a power in the usual form, enabling the trustees to sell the property, and to give receipts for the purchase-money.

In 1854 the funds subject to the trusts of the second settlement were advanced to *Robert Rawlins* on the security of the same property as was comprised in the mortgage of the 23rd of April, 1851, and certain additional property. The security was effected by a mortgage of the 30th of May, 1854, to which *Jeremiah Pilcher* and his wife were parties, and which contained a recital of the second of the settlements of the 23rd of August, 1830.

Upon the execution of these mortgages the documents of title relating to the property therein comprised were delivered to *William Humphrey Pilcher* (who was a solicitor) on behalf of himself and his co-trustees. The interest was regularly paid to *Jeremiah Pilcher*, as tenant for life, down to May, 1864, after which date it fell into arrear. In July, 1865, *Jeremiah Pilcher* called upon *William Humphrey Pilcher* to hand over the title-deeds, and received from him a box containing the two mortgage deeds only. It was then discovered that the property comprised in these securities had been dealt with as follows:—

On the 2nd of April, 1856, *Rawlins* executed a mortgage to two trustees, named *Stockwell* and *Lamb*, who advanced a sum of £10,000 out of their trust funds. This mortgage comprised a certain estate known as the *Whitchurch* property, included both in the mortgage of the 23rd of April, 1851, and also in that of the 30th of May, 1854. Messrs. *Stockwell* and *Lamb* were in perfect ignorance of the prior mortgages. *Rawlins* (who had been at one time a solicitor, but had then retired from practice) prepared and sent the abstract, in which he omitted all mention of either the mortgage of 1851 or that of 1854, and made out a title in fee simple to himself. On the same 2nd of April, 1856, and prior to the execution of the mortgage by *Rawlins* to Messrs. *Stockwell* and *Lamb*, *W. H. Pilcher* executed an indenture which was apparently

M. R. 1870 PILCHER v. RAWLINS. JOYCE v. RAWLINS.

not intended to be used unless occasion made it necessary. By this indenture, after reciting the deed of the 23rd of April, 1851, *W. H. Pilcher*, in consideration of the payment by *Rawlins* to him of £3500 in part discharge of the mortgage debt, purported to reconvey the *Whitchurch* property to *Rawlins* in fee, discharged from the mortgage of the 23rd of April, 1851. On the same day a receipt for £5000 by *W. H. Pilcher*, written on a separate piece of paper, and the title-deeds relating to the *Whitchurch* property (other than the two mortgages and the reconveyance), were delivered to Mr. *Madden*, one of *W. H. Pilcher's* clerks, with distinct instructions not to give up the deeds or the receipt unless the money mentioned in the receipt was paid. Upon this, Mr. *Madden*, accompanied by *Rawlins*, went to the *London Coffee House*, where *Rawlins* obtained the £10,000 from *Stockwell* and *Lamb* on delivery to them of their mortgage and of the title-deeds to the *Whitchurch* property. Of this sum £5000 was handed to *Madden*, and on the same day paid in by him to the private banking account of *W. H. Pilcher*, who afterwards appropriated it to his own use. The remaining £5000 was retained by *Rawlins*. The reconveyance of the 2nd of April was handed to *Stockwell* and *Lamb* by *Rawlins'* solicitors after the institution of the suit. It was unstamped when so handed over, and continued to be so until the hearing of these suits. No receipt was indorsed on it.

By an indenture, dated the 11th of April, 1861, *Rawlins*, in consideration of £2590 therein expressed to be paid to him by *W. H. Pilcher*, purported to convey to *W. H. Pilcher* in fee certain real estate known as "the *Smithfield* and *New Street* properties," and included in the mortgages of 1851 and 1854. A receipt for £2590 was indorsed on this deed, but no money was actually paid by *Pilcher* to *Rawlins*.

In April, 1860, *John Houghton Ward*, one of the executors of the will of *John Matthews*, filed a bill against *William Humphrey Pilcher*, his executor, to compel him to account for assets of the testator in his hands. In November, 1860, an order was made in that suit that *W. H. Pilcher* should pay into Court £3000 admitted by his answer to be in his hands. *W. H. Pilcher* paid in £1000, and proposed to give as a security for payment of the rest a mortgage of the *Smithfield* and *New Street* properties, which he alleged

that he had contracted to purchase from *Rawlins*. The proposal was accepted; and *W. H. Pilcher* delivered an abstract of title, in which the mortgages of 1851 and 1854 were suppressed. The title was referred to one of the conveyancing counsel to the Court, and was approved by him; and by an order of the 11th of November, 1861, *W. H. Pilcher* was ordered to execute a mortgage of these properties to *Ward*, which was accordingly done. On taking the accounts, further sums were found due from *W. H. Pilcher*, and under an order of Court the payment of these was secured on the same properties.

Messrs. *Stockwell* and *Lamb* and Mr. *Ward* pleaded that they were purchasers for value without notice, and claimed priority over the Plaintiffs.

Rawlins denied his liability to make good any loss occasioned to the trust estates; but a detailed report of this part of the case is unnecessary.

Mr. *Southgate*, Q.C., Mr. *Bristowe*, Q.C., and Mr. *Kingdon*, for the Plaintiffs in both suits:—

First, as regards *Stockwell* and *Lamb*. Either they claim the benefit of the deed of the 2nd of April, 1856, or they do not. If they do not, they have simply an equitable estate posterior to that of the Plaintiffs in point of time, and consequently posterior in point of title. If they do claim the benefit of that deed, they must be treated as having had notice of everything as to which an examination of the deed ought to have led them to inquire, and therefore of the Plaintiffs' title. But even if they are to be treated as not having had such notice, still they cannot claim the benefit of a conveyance by the trustee for the Plaintiffs in breach of his duty to them: *Willoughby* v. *Willoughby* (1); *Maundrell* v. *Maundrell* (2); *Ex parte Knott* (3); *Carter* v. *Carter* (4); *Bates* v. *Johnson* (5); *Prosser* v. *Rice* (6); *Sharples* v. *Adams* (7); *Pease* v. *Jackson* (8).

Mr. *H. C. Ward*, Mr. *Swan*, and Mr. *W. Pearson*, for Defendants in the same interest as the Plaintiffs.

(1) 1 T. R. 763.
(2) 10 Ves. 246.
(3) 11 Ibid. 609.
(4) 3 K. & J. 617.
(5) Joh. 304.
(6) 28 Beav. 68.
(7) 32 Ibid. 213.
(8) Law Rep. 3 Ch. 576.

M. R.
1870
PILCHER
v.
RAWLINS.
JOYCE
v.
RAWLINS.

Mr. *Jessel*, Q.C. and Mr. *Wickens*, for *Stockwell* and *Lamb* :—

We are purchasers for value; we have got in the legal estate, and at the time when we paid our money and got in the estate we had no notice of the Plaintiff's title, which is a purely equitable one. There is only one case in which, under such circumstances, the purchaser has been ousted, viz., *Carter* v. *Carter* (1). That was a case of the first impression, and we submit that the decision was not well founded. The rule on which the Court acts in protecting a purchaser for value, who has got in the legal estate, is, that such a purchaser is not to be deprived of any advantage he may have at law, unless you can shew something to affect his conscience. What is there here to affect the purchaser's conscience? It is said that the purchasers had notice of the Plaintiff's title. Now, actual notice they clearly had not; and if they are to be affected with constructive notice, the doctrine of the Court must be extended beyond the previous decisions—a thing which many eminent Judges, including the present Lord Chancellor, who decided *Carter* v. *Carter*, have said ought not to be done.

Consider the hardships and absurdities to which that decision leads. Suppose a person is owner in fee, subject to charges in favour of his younger brothers, and that he conveys the estate to his brothers upon trust for himself for life, with remainder over, and then sells, suppressing the settlement, and the brothers join in the conveyance to the purchaser. How could the persons claiming under the settlement be heard to set up their title against that of the purchaser? Again, suppose an owner in fee simple dies intestate, as is supposed, and his heir-at-law enters and sells to a purchaser; then, many years afterwards, it is found that the supposed intestate made a will, by which he devised the estate to his heir upon trusts. Can it be possible that the *cestuis que trust* could oust the purchaser?

It does not matter how the purchaser gets in the legal estate, provided he has no notice at the time when he advances his money. If he does not get in the legal estate at that time, he may even do so afterwards. It is true that if he gets in the estate afterwards from a trustee, he takes subject to the rights of the

(1) 3 K. & J. 617. 4 Jur. N.S. 63.

cestuis que trust; but that observation does not apply to a case where the legal estate is got in when the money is advanced.

As to the authorities. The principle for which we contend is clearly and broadly laid down in *Basset* v. *Nosworthy* (1). The *dicta* in *Maundrell* v. *Maundrell* (2) and *Ex parte Knott* (3) only go to this, that if you find that the legal estate is outstanding in a dry trustee, and if you have discovered that there is an incumbrance prior to your own, you must ask the trustee whether he knows of any prior incumbrance before you get in the legal estate from him. *Wallwyn* v. *Lee* (4) is an authority against the decision in *Carter* v. *Carter* (5). In that case the tenant for life made a settlement, holding himself out to be absolute owner, and made a mortgage in fee and delivered the title-deeds to the mortgagee. After his death the remainderman in tail filed a bill for discovery and possession of the title-deeds. Now the mortgagee had lawfully obtained possession of the deeds, because the tenant for life was entitled to the custody of them; only, however, by virtue of the settlement, of which, on the principle laid down in *Carter* v. *Carter*, the mortgagee ought to be deemed to have had notice. Yet Lord *Eldon* held the contrary, and allowed a plea of purchase for valuable consideration without notice. *Jones* v. *Powles* (6) and *Young* v. *Young* (7) are authorities in our favour. *Prosser* v. *Rice* (8) and *Sharples* v. *Adams* (9) have no bearing on the doctrine of *Carter* v. *Carter*.

Even if *Carter* v. *Carter* be rightly decided, this case is distinguishable. There the trust of which the purchaser was held to have notice appeared on the face of the instrument by which the legal estate passed; here it does not.

We also contend that, if the purchaser was put on inquiry as to the trusts, still, if he had inquired, he would have found nothing wrong. It is said that the purchaser ought to have obtained the consent in writing of *Jeremiah Pilcher;* but his consent is required only to variations of the investments, not to the receipt by the trustees of money due on a mortgage. Moreover, the mortgage-

(1) 2 Wh. & T. L. C. 1, 3rd Ed.
(2) 10 Ves. 246.
(3) 11 Ibid. 609.
(4) 9 Ibid. 24.
(5) 3 K. & J. 617.
(6) 3 My. & K. 581.
(7) Law Rep. 3 Eq. 801.
(8) 28 Beav. 68.
(9) 32 Beav. 213.

M. R. 1870 PILCHER v. RAWLINS. JOYCE v. RAWLINS.

money is expressly made payable to the trustees or the survivors or survivor of them; and that can have no meaning but this, that the settlement was not to be called for when the mortgage-money was paid off; and the circumstance that the debt was paid off a few days before the expiration of the time fixed for redemption is immaterial.

Sir *R. Baggallay*, Q.C., and Mr. *Ferrers*, for *Ward*, adopted the same line of argument; and cited, in addition to the cases previously mentioned, *Dodds* v. *Hills* (1).

Mr. *Hinde Palmer*, Q.C., and Mr. *Herbert Smith*, for *Rawlins*.

Mr. *Roxburgh*, Q.C., and Mr. *Drewry*, for the representative of *William Humphrey Pilcher*.

Mr. *Southgate*, in reply :—

There is no receipt clause in the mortgage deed of 1851, except on the exercise of a power of sale contained in it, and the deed discloses the fact that the mortgage-money was held upon trust; consequently the purchaser was bound to see that the money due on the mortgage was properly applied, in accordance with the provisions of the deed of settlement. The settlement contains the usual trustee receipt clause, and if the mortgage-money had been paid off *simpliciter*, I do not deny that *William Humphrey Pilcher* might have given a good receipt for it. But that is not the transaction on the face of the reconveyance. That deed purports to be a release of part of the mortgaged property, upon payment of part of the mortgage debt. That is a plain variation of an investment, and could not be done without the consent of *Jeremiah Pilcher*.

Carter v. *Carter* (2) is on all-fours with the present case. It was decided thirteen years ago; and although comments have been made on some parts of the judgment, the decision itself has never been questioned by any Judge or text-writer.

Dec. 5. LORD ROMILLY, M.R. :—

The object of these suits is to enforce a security taken for trust funds. The real question to be determined is, which of two

(1) 2 H. & M. 424. (2) 3 K. & J. 617.

innocent persons is to bear the loss consequent on a gross breach of trust and a fraud perpetrated upon them? I will first consider the case as between the Plaintiffs on the one side and the Defendants *Stockwell* and *Lamb* on the other. [His Lordship then stated the facts relating to this part of the case, and continued:—] A more improper transaction, so far as *W. H. Pilcher* and *Rawlins* were concerned, it is difficult to conceive. It is obvious, on the facts of the case, that both of them knew perfectly well that the whole thing was done without the knowledge of the *cestuis que trust*, and that no part of the money would go to them; and accordingly none ever did. It so happened that *W. H. Pilcher* was the sole surviving trustee of the first indenture of settlement, and the consequence was that the deed of the 2nd of April, 1856, did convey the legal estate to *Rawlins*. The first and most important question to be considered in this part of the case is, whether *Rawlins* could obtain a title to give to *Stockwell* and *Lamb* by inducing the trustee, *W. H. Pilcher*, to commit a breach of trust, and whether *Stockwell* and *Lamb* can rely upon a legal estate obtained, as it were, accidentally in this manner, the deed which conveyed it to *Rawlins* being wholly unknown to them, and forming no part of the title shewn to them, and which deed, if it had been known to them, would have disclosed to them the existence of the mortgage of the 23rd of April, 1851, and the trusts which affected the property. The cases relating to the advantage acquired by the assignment of the legal estate are numerous, and the leading case as to the effect produced by the conveyance of it is *Willoughby* v. *Willoughby* (1), one of Lord *Hardwicke's* great judgments, which lays the foundation for the doctrine respecting it on a safe footing. It is true, however, that that case does not govern the present, but it is in accordance with the principle enunciated in the case lately decided by the Lord Chancellor, which does affect it very closely; that is the case of *Carter* v. *Carter* (2). The case of *Carter* v. *Carter* was this: The testator died in 1847, leaving a will of January, 1846, by which he gave a beneficial share in real estates to *John Carter*. Thereupon *John Carter*, believing himself to be the beneficial owner, conveyed it to Defendant as mortgagee; afterwards a later will of the testator,

(1) 1 T. R. 763. (2) 3 K. & J. 617.

M. R. 1870

PILCHER v. RAWLINS.

JOYCE v. RAWLINS.

dated in April, 1846, was discovered, by which *John* took no beneficial interest in the property mortgaged, but by which the legal estate was devised to him (and two others) as trustees for other persons. The two other trustees disclaimed, and *John Carter* thereupon became the sole trustee, and by it the legal estate was vested in him which he had already conveyed to his mortgagee. The Lord Chancellor held, after long argument and elaborate judgment, and full examination of all the authorities, that the mortgagee could not rely on the legal estate under the second will which disclosed the trust. If both parties had known of the will before the conveyance of the property, it would have been clear that the mortgagee could have obtained no advantage from it. The Lord Chancellor held that he could not approbate and reprobate the will, to use a Scottish expression, and that if he relied on it to shew that *John Carter* had the legal estate, he must also admit it as giving himself notice of the trust.

Now, how does that apply here? I think it does very clearly. *Stockwell* and *Lamb* did not know of the deed which gave the legal estate to *Rawlins* till November, 1865, three months after the bill was filed, which was in August, 1865; and when the deed is produced it shews a state of things which, if it had been disclosed to them before the money was advanced, would have caused them to pause and make further inquiries. The principle of the decision in *Carter* v. *Carter* (1) seems to me to be sound. It seems to me that it is sought to be put thus: If you rely on an instrument of which you were wholly ignorant at the time you advanced the money you must take it as it stood at the time, with all the necessary consequences attending it; and I think that the question I have to decide here is this, whether, if at the meeting at the *London Coffee House* this deed had been produced, as giving *Rawlins* the legal estate, *Stockwell* and *Lamb* would have exercised such reasonable caution and prudence in making no further inquiry or investigation as to entitle them to say that they are purchasers for value without notice of any prior incumbrance? In the first place, the deed contradicts the abstract furnished to them. How did the legal estate get into *W. H. Pilcher?* What was this mortgage therein recited? Then the appearance and nature of the deed is

(1) 3 K. & J. 617.

to be considered; it is produced without any stamp, without any receipt attached to it; it expressly recites the prior mortgage of the 23rd of April, 1851; it recites that *W. H. Pilcher* is sole trustee, and that the money has been repaid, and in this state of things the trustees, *Stockwell* and *Lamb*, advance trust money on this security without further inquiry—without looking at the mortgage deed of April, 1851, of which they have distinct notice, without even ascertaining whether *W. H. Pilcher* is the sole trustee, without proof that he has received the money; and yet nevertheless they give £10,000 of their *cestuis que trust's* money. If such had been the fact, my belief is that in no Court of Equity could such conduct be justified or the trustees who advanced the money exonerated from the consequences; and in the case of *Ex parte Knott* (1) Lord *Eldon* seems to hold that this is the proper test of the effect of the conveyance of the legal estate. It is true that the gentlemen in question did not so act, and it is equally true, as I firmly believe, that nothing would have induced them so to act; but the difficulty they are under is this: Can I allow them to claim the benefit of this deed without saddling themselves with all the consequences which would have followed from their seeing it if they had done so at the time when the conveyance of the legal estate was made to them? I think that I cannot. They cannot blow hot and cold—they cannot say we will take advantage of this deed so far as it conveys the legal estate, of which we know nothing; but we repudiate the deed so far as it discloses to us circumstances the knowledge of which would have prevented us from completing the transaction. Must there not be imported into this claim the knowledge of matters which were patent on the face of the deed? I think, notwithstanding the vehement attacks I have heard against the case of *Carter* v. *Carter* (2), that it is a just and valuable decision, and according to the true principles which lie at the foundation of Equity.

No doubt the case before me is a very melancholy one, and one very discreditable to the law of this country, in which alone I believe such a case could occur, and where, I regret to say, it occurs frequently; and one of the sad consequences is, that the possibility of committing such a fraud induces persons in diffi-

(1) 11 Ves. 609. (2) 3 K. & J. 617.

M. R. 1870 PILCHER v. RAWLINS. JOYCE v. RAWLINS.

culties to appropriate to themselves the moneys of others by acts which in moral culpability are not, in my opinion, inferior to felony.

As for Mr. *Rawlins*, no excuse can be urged. He is shewn to be knowingly culpable throughout. He made out and delivered the abstract, he received the money, he suppressed the knowledge of the mortgage, and upon the evidence of Mr. *Madden* I consider it to be clear that, unless Mr. *Rawlins* had divided the £10,000 with Mr. *W. H. Pilcher*, he could not have obtained *W. H. Pilcher's* consent or concurrence. Therefore, as regards Messrs. *Stockwell* and *Lamb*, I shall declare that the Plaintiffs' mortgage of the 23rd of April, 1851, has priority over that of the 2nd of April, 1856.

As regards *Rawlins*, an account must be taken of what is due on the mortgage for principal, interest, and costs, and he must be ordered to pay that amount; and of course the same account must be directed against the estate of *W. H. Pilcher*.

I come now to the case of Mr. *Ward*. The facts which raise it are these:—[His Lordship stated them.] I am of opinion that the conveyance of the *Smithfield* and *New Street* property by *Rawlins* in 1861 to *W. H. Pilcher* was done with full knowledge that it was done for an improper purpose, and in order to enable *W. H. Pilcher* to commit a breach of trust. I am of opinion that this is clearly established by the evidence of the whole case. Does the fact of *Rawlins* knowing of this impropriety and knowing of the existence of the other trusts invalidate the conveyance to *Pilcher*, and consequently prevent him from conveying the legal estates to Mr. *Ward?*—in other words, to use the words as attributed by the Lord Chancellor to Lord *Eldon*, can the purchaser insist on any benefit to be derived from that which would be a breach of trust in the trustees? I am of opinion that, in the circumstances of this case, Mr. *Ward* cannot insist on any such benefit, and that Mr. *Ward* does not by that means obtain any benefit by the conveyance of the legal estate, and consequently that the mortgage of April, 1851, has priority over Mr. *Ward's* mortgage.

Solicitors: Mr. *S. W. Johnson;* Messrs. *Johnson & Weatheralls;* Mr. *Walter Prideaux;* Mr. *Gedge*.

SOUTHALL *v.* BRITISH MUTUAL LIFE ASSURANCE SOCIETY.

M. R. 1870 Nov. 21, 22, 23; Dec. 8.

Company—Transfer of Business—Ultrà Vires—Winding-up—Companies Act, 1862, s. 161.

An unregistered company which has no power under its deed of settlement to sell or transfer its business to another company may, nevertheless, carry into effect an agreement for that purpose by registering under the *Companies Act*, 1862, passing a resolution for voluntarily winding-up, and directing the liquidators to carry out the agreement.

THIS was a suit by *Horatio Southall* and *Edgar Brooks*, on behalf of themselves and all other members of the *British Mutual Life Assurance Society* (hereinafter called the *Society*), except the Defendants, the directors of the *Society*, against the *Society*, the directors of the *Society*, the *Prudential Assurance Company* (hereinafter called the *Company*) and the directors of the *Company*.

The *Society* was a mutual life insurance company, established originally in 1844, but governed by deed of settlement, dated 1851. Of this deed it is unnecessary to say more than that it contained clauses providing for the dissolution of the *Company* in a particular manner, but that it contained no provisions for the amalgamation of the *Society* with or the sale of its business to any other company.

In April, 1865, the Plaintiff *Brooks* effected a policy of insurance on his own life in the *Society*. The policy contained a provision that, during the continuance thereof, the *Society* should not be bound by or take any notice of any assignment, transmission, or vesting thereof, or be bound by or take any notice of or be affected by any joint tenancy or tenancy in common, or trust, or equitable or reversionary interest therein. In May, 1866, *Brooks* assigned this policy to the Plaintiff *Southall* absolutely, and notice of the assignment was given to the *Company*: but in order to avoid any question as to *Southall's* right to sue, *Brooks* was made a co-Plaintiff. *Southall* was also the assignee either absolute or by way of mortgage of other current policies of assurance in the *Society* for sums amounting in the whole to £2300. Some of these policies had

M. R. 1870

SOUTHALL v. BRITISH MUTUAL LIFE ASSURANCE SOCIETY.

been assigned to *Southall* in consideration of his releasing debts due to him; and the assignments thereof contained covenants by the debtors to pay the premiums on the policies.

In September, 1867, the directors of the *Society* declared a bonus of 20 per cent. on the paid-up premiums. In June, 1868, they issued a report, in which they stated that the statement of accounts for the financial year ending on the 25th of March then last would bear a favourable comparison with the preceding ones, and would shew a steady and progressive increase in the operations of the *Society;* and that they had every encouragement to hope that, at the next division of profits, in 1872, they would be able again to recommend a liberal bonus.

The *Company* was a proprietary company, and was governed by a deed of settlement of the 17th of January, 1861, under which the *Company* had power to purchase or otherwise acquire the business of any other company or companies, or society or societies, of a similar nature. In addition to the ordinary business of life assurance, the *Company* had power to effect assurances in cases of sickness and accident.

On the 10th of October, 1868, a provisional agreement was entered into between the directors of the *Society* and the *Company* for the transfer of the business, assets, and liabilities of the *Society* to the *Company.* This agreement contained a clause providing that each of the directors should receive the sum of £600, and the secretary £5000, by way of compensation for loss of office. On the same day the directors of the *Society* issued a circular calling a special meeting of the members on the 29th of October, for the purpose of considering the agreement; and also a general meeting on the same day, as soon as the business of the special meeting might be terminated, to consider the expediency of registering the *Society* under the *Companies Act*, 1862, and to pass such resolutions in reference thereto as might at such meeting be considered expedient. A copy of this circular was sent to the Plaintiff *Southall*, who immediately wrote to the secretary of the *Society* stating that he objected to the proposed arrangement.

The meetings called for the 29th of October were duly held, and resolutions were passed by large majorities of the members present personally or by proxy, approving of the agreement and

sanctioning the registration of the *Society* under the *Companies Act*, 1862. On the 30th of October the *Society* was registered accordingly. On the same day circulars were issued, calling a special general meeting on the 17th of November, for the purpose of passing a special resolution under the *Companies Act*, 1862, approving and adopting the agreement of the 10th of October, and also for the purpose of passing a special resolution, requiring the *Society* to be wound up voluntarily, and for the purpose of appointing liquidators, and of giving authority to such liquidators to carry out the agreement on the part of the *Society*.

A meeting was accordingly duly held on the 17th of November, and the following resolutions were passed by the majority required by sect. 51 of the *Companies Act*, 1862:—

"1. That the agreement made by the board of directors of the *Society* with the *Prudential Assurance Company*, dated the 10th day of October, 1868, for the transfer of the business and the policies and assets of this *Society* to the *Prudential Assurance Company* be and the same is hereby approved and adopted.

"2. That the *Society* should be wound up voluntarily.

"3. That *Edwin Henry Galsworthy*, of *Poultry Chambers, London*, Esquire, be and he is hereby appointed liquidator of the *Society*; and he is hereby authorized, directed, and empowered to carry out and bring into operation the said agreement entered into by the board of directors of the *Society* with the *Prudential Assurance Company*, dated 10th October, 1868."

These resolutions were duly confirmed at a meeting held on the 4th of December. The transfer of the business and assets was afterwards carried into effect. The directors and officers of the *Society* received the compensation stipulated by the agreement. The liquidators, in pursuance of sect. 142 of the *Companies Act*, rendered an account of their proceedings to a meeting called for the purpose on the 8th of April, 1869, and made a return of such meeting to the Registrar of Joint Stock Companies on the 10th of April, 1869. The period of three months mentioned in the 143rd section expired on the 10th of July, 1869, so that if these proceedings were valid, the *Society* was now dissolved.

The bill was originally filed on the 10th of November, 1868, and was afterwards amended, and as amended prayed for a declaration

M. R.
1870
SOUTHALL
v.
BRITISH
MUTUAL LIFE
ASSURANCE
SOCIETY.

that the agreement of the 10th of October, 1868, was beyond the powers of the *Society* and the *Company*, and was invalid and void; for an injunction to restrain the Defendants from carrying it into effect, and the directors of the *Society* from selling, transferring, or otherwise dealing with the business and assets of the *Society* contrary to the provisions of the deed of settlement; for an order directing the *Company* to transfer the assets received by them under colour of the agreement to the liquidator of the *Society* as assets of the *Society*; for a declaration that the *Society* ought to be wound up, and its affairs dealt with in accordance with the provisions of the deed of settlement; for an order directing the directors of the *Society* to repay to the liquidators of the *Society*, as assets of the *Society*, the amounts received by them for compensation under the agreement; and for damages and costs.

Notice of motion for an injunction was given, but before the motion was heard the transfer of the business and assets had been completed.

The Defendants alleged that the Plaintiffs were the only persons who objected to the agreement, all the other members of the *Society* having accepted the liability of the *Company*.

Mr. *Jessel*, Q.C., and Mr. *Waller*, for the Plaintiffs:—

The agreement was *ultrà vires* both of the *Society* and the *Company*. It is not pretended that the *Society* had, under its deed of settlement, any power to enter into such an agreement. The *Company* have power to acquire the business of any other company of a similar nature; but the *Society* was a mutual company, and totally different in its nature from the *Prudential Company*, which is an ordinary proprietary company. Even if the *Prudential Company* had been a mutual company the Plaintiffs could not be compelled to become members of it, seeing that its business includes not merely life assurance, but assurance in cases of sickness and accident, which is of a risky and uncertain description.

It is, however, said that the transfer is valid under sect. 161 of the *Companies Act*, 1862. In reality the transaction was a fraud on that section, which was intended to be auxiliary to a *bonâ fide* winding-up, and not to be the means of carrying into effect an *ultrà vires* agreement. Moreover, that section merely enables the

liquidators to sell the business of the *Company*, and to receive shares of another company in payment. Here, in the first place, the liquidator does not sell, he merely obeys the directions given to him by the resolutions. Again, the liquidator receives nothing; the only persons who receive anything are the directors of the *Society*, and all the other members are simply handed over to another company.

It is clear that if the Defendants succeed the Plaintiff *Southall* will be most materially injured; for he will no longer be able to enforce the covenants in consideration of which he has released his debtors from their debts.

[They cited *Natusch* v. *Irving* (1); *Const* v. *Harris* (2); *Re Phœnix Life Policy Company* (3); *Kearns* v. *Leaf* (4); *Law* v. *Indisputable Life Policy Company* (5); *Re State Fire Insurance Company* (6); *Gregory* v. *Patchett* (7); *Simpson* v. *Denison* (8); *Clinch* v. *Financial Corporation* (9); *Hutton* v. *Scarborough Cliff Hotel Company* (10).]

Sir *R. Baggallay*, Q.C., and Mr. *Phear*, for the directors of the *British Mutual Society*, and Mr. *Southgate*, Q.C., and Mr. *Chester*, for the *Prudential Company* and its directors:—

We do not dispute any of the cases cited on behalf of the Plaintiffs, but we say they are all irrelevant, except *Clinch* v. *Financial Corporation*. There an amalgamation was set aside because the terms imposed a fresh liability on the shareholders, an objection which does not apply here; and in fact the judgment of the present Lord Chancellor (11) is strongly in our favour. He held that the amalgamation could not be supported under the articles of association of the company; and then proceeded as follows (12): "The question then comes to this, whether this was an arrangement which can be supported under the 161st section of the *Companies Act*, 1862. Now it is clear that the 161st section points to this, that if a company be desirous of merging themselves in another company, inasmuch as a minority of dissentient share-

(1) 1 Lindley on Partnership, 605.
(2) T. & R. 496.
(3) 2 J. & H. 441.
(4) 1 H. & M. 681.
(5) 1 K. & J. 223.
(6) 1 D. J. & S. 634.
(7) 33 Beav. 595.
(8) 10 Hare, 51.
(9) Law Rep. 4 Ch. 117.
(10) 2 Dr. & Sm. 514.
(11) Law Rep. 5 Eq. 450.
(12) Ibid. 472.

M. R. 1870 SOUTHALL v. BRITISH MUTUAL LIFE ASSURANCE SOCIETY.

holders cannot be compelled to take shares in the other company, it may be desirable that the first company shall have a power of closing its concerns and winding up its affairs, and upon so doing, of selling its assets to the other company, which may be disposed to purchase those assets, paying for them in shares. Then it would be for the shareholders in the company which was being wound up to say whether they will take shares or not." That passage is an express authority for the proposition that a sale which is beyond the powers of a company, as defined by the deed of settlement, may be carried into effect under sect. 161 of the *Companies Act*.

By sect. 180 of the *Companies Act* unregistered companies are empowered to register under the Act; and it is expressly declared that "no such registration shall be invalid by reason that it has taken place with a view to a company being wound up." Consequently the Plaintiffs could not have prevented the *Society* from registering. That being so, the Plaintiffs must be bound by all the consequences of registration. By registration the *Society* acquired the power, without any restriction or limitation, to resolve to be wound up in accordance with sect. 129 of the Act. Having passed a resolution for winding-up, the *Society* could direct the liquidators to sell the assets of the *Company*: Sects. 95, 133, 161. What right has the Court to go behind the resolution to wind up?

Further, what relief can the Plaintiffs have? That prayed by the bill is wholly inconsistent with the present state of circumstances of the *Society*, except in so far as it sought to make the directors liable for the compensation they have received. That, however, can only be done upon the terms of the Plaintiffs affirming the agreement.

[They cited the following cases: *In re Imperial Bank of China, India, and Japan* (1); *Imperial Bank of China, India, and Japan* v. *Bank of Hindustan, China, and Japan* (2); *In re Anglo-Italian Bank and De Rosaz* (3).]

Mr. *Jessel*, in reply:—

The case of *Imperial Bank of China, India, and Japan* v. *Bank*

(1) Law Rep. 1 Ch. 339. (2) Law Rep. 6 Eq. 91.
(3) Law Rep. 2 Q. B. 452.

of Hindustan, China, and Japan (1) shews the nature of the relief which the Plaintiffs ought to receive, if they are entitled to any. As to the prayer, if pending an injunction suit the Defendant has acted contrary to the injunction prayed for, the Court at the hearing will set aside such acts without a special prayer.

The transaction cannot be supported under sect. 161, for the following reasons: 1. The section contemplates a sale to facilitate a winding-up, not a winding-up to facilitate a sale. This is apparent from the position of the section in the Act: it is in part 4 of the Act, which relates to winding-up, and is in the midst of what are called "Supplemental Provisions," being a series of clauses, all of which relate to what may be done by way of facilitating winding-up. Here it is obvious from the report made in June, 1868, which the directors at all events cannot be allowed to say was untrue, that there was no necessity to wind up the company, except for the purpose of carrying this sale into effect. 2. The clause only authorizes the conferring of power on the liquidators: here all power was taken out of their hands; they were, by the resolutions, "directed" to carry out the agreement. 3. Whatever is done under the clause must be done through the liquidators, who are the parties to receive what is paid. Here the liquidators received nothing: all that was paid went into the hands of the directors and officers of the *Society*. 4. The clause cannot apply to mutual insurance companies. 5. The clause only validates acts of the selling company: here the buying company had no power to buy. 6. The clause only authorizes a sale for the purpose of distributing the assets *pro ratâ* among the members; not one, as here, where the directors have obtained an advantage over the other members of the *Company*.

Dec. 8. LORD ROMILLY, M.R.:—

The facts of this case raise an important question, which I do not know to have been expressly decided. It is shortly this: Whether the 161st section of the *Companies Act*, 1862, can be made ancillary and subservient to the carrying into execution and

(1) Law Rep. 6 Eq. 91.

M. R. 1870 SOUTHALL v. BRITISH MUTUAL LIFE ASSURANCE SOCIETY.

giving effect to a contract which the contracting parties had no power to enter into.

[His Lordship then stated the facts, and continued:—]

I pass over the £5000 paid to the secretary and the £600 paid to each of the directors of the *Society*. These details cannot, in my opinion, affect the question I have primarily to decide. It is proper, however, to observe that there was no concealment of these payments, and that, though they were not ostentatiously announced, they were not concealed; and any one who thought fit might have ascertained the exact terms on which the transfer was proposed to be made. It is also clear that the Plaintiff *Southall* was very seriously affected by this transfer, and that the covenants on which he relied, and which formed a part of his security, were seriously affected, if not destroyed, by this transfer.

The arguments against the application of this clause to the present state of things which weighed most with me were, first, that the clause clearly applied to a liquidation, and that accordingly it gives power to a liquidator, and to him only; that the clause is permissive and not compulsory; next, that the clause is clearly, in this case, not used for a *bonâ fide* purpose; for that, in the ordinary sense of the word, a *bonâ fide* winding-up was not, in any respect, contemplated here; but the clause was employed as a mere attempt or device by which to support a transaction radically bad by reference to a section framed for another and distinct purpose. At the same time, and on the other hand, this view of the case has struck me very forcibly: It is clear that the Legislature did not intend to limit the application of this statute to cases of insolvent companies, but meant that the shareholders of any company might, if they took the proper steps, voluntarily wind up any solvent company or association; and if such a company might do so, then what was there to prevent the shareholders from obtaining the benefit of the powers conferred by this section? The section itself points out that it is not confined to agreements entered into after the resolution to wind up had been come to; and if so, how can this Court draw an arbitrary distinction between cases where the object was solely to give validity to a contract, and cases where the contract was only one of the objects to be

accomplished? It is true that by this means it may be that a man who has joined a society with a view to have it fairly tried may suddenly find himself linked with a company for a totally different purpose; and it is urged that if this be so, then all the machinery of the statute is only an expensive and circuitous mode of making legal an illegal act, and giving a majority power in such cases to bind a minority. But if the Legislature has so ordered, the Court has no power of altering it, although it may be of opinion that it would have been much better and simpler to have introduced a clause enabling the majority of a company to bind the minority in contracts *ultrà vires* of this description, instead of going through the expensive and dilatory process of a winding-up. It is, however, observed, in answer to this, that the clause also provides for the objecting shareholder being paid the value of his property in the association. Unfortunately the Plaintiff here was placed in this dilemma: if he availed himself of this provision, he must have abandoned his suit, of which he would have had to pay the costs; and if he did not, he lost the benefit of the provision. Accordingly, the Plaintiff having abstained from making his claim, cannot now avail himself of it. Still, upon full consideration of the whole matter, and having regard to the observations of Lord *Hatherley* in the case of *Clinch* v. *Financial Corporation* (1), where his Lordship seemed to be clearly of opinion that a contract *ultrà vires* of the directors might be supported under the 161st section of the *Companies Act*, 1862, I am of opinion that that section does empower the *Society* and the *Company* to form the arrangement they have come to.

I do not forget the argument raised, that the *Company* had no power under its deed to enter into any such contract. This question is solely rested on the somewhat technical ground that, though the *Company* had power to buy the business of any other association of a similar nature, if the business of the *Society* was of a similar nature to that of the *Company*, still the *Society* itself was not of a similar nature to the *Company*, because mutual and proprietary assurance companies are of a different and distinct character; and still more so is it of a distinct character when it insures against accidents and against sickness. But I think this is too refined a

(1) Law Rep. 5 Eq. 472.

M. R. 1870 SOUTHALL v. BRITISH MUTUAL LIFE ASSURANCE SOCIETY.

distinction; at all events, I should not be disposed to rely upon it in a suit where the expression of an opinion to that effect could bind no one in the *Company*, and which could only be used incidentally to affect the contract of the *Society*.

I have hesitated a good deal about the costs; but, on a full consideration of the case, I do not think this is a case for giving any costs. Whether the directors of the *Company* were properly made parties, having regard to the views I have taken of this case as to the legality of this proceeding, may reasonably be doubted, notwithstanding the discovery required from them; but they have very properly joined the *Company* in their appearance, and consequently no extra costs—or to a very inconsiderable amount—have been incurred thereby; and I think that I shall best do justice in this case, which is a very peculiar one, by dismissing the bill without costs.

Solicitors: Mr. *A. D. Smith*, agent for Mr. *E. Oliver*, *Birmingham*; Messrs. *Barnard & Co.*

M. R. 1870 *Feb.* 22; *April* 22; *Nov.* 21.

HOPGOOD *v.* PARKIN.

Trustee—Loss of Trust Fund—Investment on Mortgage—Negligence of Solicitor—Liability of Trustee.

A trustee is liable for the loss of a trust fund occasioned by his solicitor having neglected to take proper precautions on the occasion of the investment of the fund on mortgage.

Whether the loss falls on the trustee if occasioned by a fraud practised on him, *quære*.

THIS was a suit by the children of *Joseph Hopgood* and *Honor* his late wife, for the purpose of compelling *James Parkin*, the surviving trustee of the settlement executed on the marriage of their parents, and the representatives of *Robert Govett*, a deceased trustee, to make good the loss sustained by the investment of the trust funds on a security which had proved insufficient.

By a settlement dated the 3rd of March, 1842, and made on the marriage of *Joseph Hopgood* and *Honor Davey*, a sum of £10,000 3 per Cent. consols in possession, and a sum of £7218 2*s.* 3*d.*

3 per Cent. Reduced Annuities in reversion expectant on the death of *Maria Davey*, were settled on the usual trusts for the husband and wife and issue of the marriage. The Rev. *James Parkin* and the Rev. *Robert Govett* (since deceased) were the trustees of the settlement, and the £10,000 consols were transferred into their names.

In 1855 the Rev. *Robert Govett*, *William Govett Romaine*, and the Rev. *John Clement Govett*, who were trustees of another settlement (for the sake of distinction called the *Govett* family settlement), advanced £12,000 of the trust money belonging to that family to one *Henry Ernest* on the security of a mortgage of his estate at *Llanon*, in the county of *Carmarthen*.

The solicitor for the *Govett* trustees was Mr. *Charles Albert Govett*. Mr. *Ernest's* solicitor was Mr. *John Charles Williams*, a partner in the firm of *Goodwin, Williams, Edwards, & Partridge*.

For the purpose of this mortgage the *Llanon* estate was valued by Mr. *Petherick*, a surveyor recommended by Mr. *John Charles Williams*. The value placed on the estate by him was £19,047.

In June, 1857, Mr. *Ernest* gave notice of his intention to pay off this mortgage. On the 15th of July, 1857, the mortgage was paid off, and the estate reconveyed to *Ernest*. For this purpose a temporary loan was in the first instance obtained from the *Equity and Law Life Insurance Office*; and then, in order to pay off this loan, *John Charles Williams*, the solicitor of Mr. *Ernest*, negotiated with *Charles Albert Govett*, who acted not merely as solicitor for the *Govett* trustees, but also as solicitor for the trustees of the *Hopgood* family, to get an advance out of the money settled on the marriage of Mr. and Mrs. *Hopgood* on the security of the estate. *Maria Davey* had then just died, and £7218 2*s.* 3*d.* Reduced 3 per Cents. had fallen into possession, and become subject to the trusts of the settlement. The advance was agreed to by *Charles Albert Govett*, and sufficient of both funds of £10,000 consols and £7218 2*s.* 3*d.* Reduced were sold out on the 31st of July, 1857, to produce £13,000, which was advanced on the security of a new mortgage by *Ernest* of the *Llanon* estate, dated the 3rd of August, 1857. The property comprised in this mortgage, however, was not exactly the same as that comprised in the former; about two-thirds of the estate included in the mortgage of 1855 was retained, and other property

M. R. 1870 HOPGOOD v. PARKIN.

equal in quantity and value to the one-third omitted was added to the new mortgage security. Mr. *Govett*, the solicitor, received for his services a lump sum of £250; he made no new valuation, no new inquiries. Having in his possession the abstract of title delivered on the occasion of the mortgage of 1855, he did not require any fresh abstract; he never inquired whether there existed any prior incumbrances; and he apparently trusted entirely to *John Charles Williams*, who shortly afterwards became a bankrupt. The consequence was, that it turned out, first, that the property on which the advance was made was worth about £16,000 instead of £19,000; and secondly, that there were two other mortgages on the estate, one dated the 18th of March, 1857, for £4000, and interest at 6 per cent. per annum, on the property included in the former mortgage, and another for £3500, and interest at 5 per cent. per annum, dated the 1st of July, 1857, on another part of the property.

A suit of *Hopgood* v. *Ernest* was instituted to settle the priorities of these mortgages, which were severely contested. In this suit, after much litigation, only one of the two last-mentioned mortgages was ultimately held to be prior to that of the Plaintiffs. The property was sold, and it turned out, after taking the accounts of what was produced by the sale and what was due to the first mortgagee for principal, interest, and costs, that a loss of £6555 6*s.* 3*d.*, or thereabouts, had been sustained by reason of this advance by the trustees, and that nothing could be recovered from Mr. *Henry Ernest* personally.

Honor Hopgood died in 1864.

Mr. *Jessel*, Q.C., and Mr. *Fischer*, for the Plaintiffs:—

The investment on the security of the mortgage of 1857 was not carried out with ordinary care. The title was not investigated, the property was not valued; there was not even an inquiry made whether the solicitors were aware of any fresh incumbrances; and although *Williams* might have given a false answer to such an inquiry, still the latter might have fallen into the hands of his partners, who were perfectly honest men, and would have given a truthful answer.

Though the trustees themselves are not in any way to blame,

yet they must be answerable for a loss occasioned by the default of their solicitors: *Eaves* v. *Hickson* (1).

Mr. *Southgate*, Q.C., and Mr. *Archibald Smith*, for *Parkin* and the executors of *Robert Govett*:—

We say that *Govett*, our solicitor, exercised ordinary care and diligence, and took every precaution which a person investing on mortgage would ordinarily take. If, notwithstanding that, it turns out that the security is a bad one, the loss must fall on the *cestuis que trust*, not on the innocent trustee: *Jones* v. *Lewis* (2); *Ex parte Belchier* (3); *Massey* v. *Banner* (4); *Clough* v. *Bond* (5). The case of *Eaves* v. *Hickson* was very different: the question was not whether the trustees had taken proper care of the trust property, but whether they had paid it to the proper parties.

Mr. *W. W. Knox*, for *Joseph Hopgood*.

Mr. *Cracknall*, for *C. A. Govett*, who had become a trustee of the settlement of the 3rd of March, 1842, and was made a party to the suit in that character.

Mr. *Fischer*, in reply.

April 22. LORD ROMILLY, M.R.:—

This case involves to some extent a question of very considerable importance, which, broadly stated and without qualification, is shortly this: If trustees are defrauded, and by reason of the fraud practised upon them lose part of the trust estate, does the loss fall upon them or upon their *cestuis que trust?* In *Eaves* v. *Hickson* I held that, if a person obtained trust property from trustees by means of a forgery, the loss fell on them and not on the *cestuis que trust*. Here the trustees advanced trust money on a property sufficient to cover the mortgage if it were the first mortgage—the fact of the existence of a prior mortgage was carefully concealed from them: does the loss fall on them or on their *cestuis que trust?* Though, in my opinion, this is the point which lies at the bottom of the question to be decided here, yet there are in the present

(1) 30 Beav. 136. (3) Amb. 218.
(2) 2 Ves. Sen. 240. (4) 1 Jac. & W. 241, 247.
(5) 3 My. & Cr. 490, 497.

M. R. 1870 HOPGOOD v. PARKIN.

case many qualifying circumstances on both sides which must be considered, and which renders it necessary shortly to refer to the facts which are proved in this cause:—[His Lordship stated them, as above.]

The question is, on whom does this loss fall? First, it is material to consider the course pursued by the solicitor of the trustees. It is true that his conduct is not theirs; but he is appointed by them, he is their agent for the management of the affairs of the trust, and if he misconducts himself through ignorance or negligence, or wilfully, he is answerable to the trustees, and they cannot, in my opinion, throw any of the loss thereby occasioned on their *cestuis que trust*. Now what is the conduct of the solicitor in this case? It does not involve one iota of moral turpitude. He acted, I have no doubt, as he believed, for the best for all parties; but in so acting he did not display the caution and vigilance which is to be expected from and is usually displayed by a solicitor for his client. The dates of the mortgages plainly shew this. The mortgage of the *Llanon* estate to the *Govett* trustees was on the 13th of October, 1855. The mortgage to the *Hopgood* trustees was on the 3rd of August, 1857. In the meantime, on one part of the property included in the former mortgage, a mortgage for £4000, with 6 per cent. interest per annum, had been effected by *Ernest*, the mortgagor, by an indenture dated the 18th of March, 1857; and on another part of the property a mortgage had been effected by *Ernest*, the mortgagor, for £3500, with interest at 5 per cent. per annum. It is true that this latter mortgage, though prior in date, was postponed to the *Hopgood* trustees' mortgage, but it was so after much expensive litigation, the cost of which, when added to the debt, increases the deficiency of the estate.

Though both these mortgages had been effected in the interval between the mortgage to *Govett's* trustees and that to *Hopgood's* trustees, yet Mr. *C. A. Govett*, the solicitor, never inquired whether any fresh incumbrances had been created, nor did he require a fresh abstract to be delivered. Whether *John Charles Williams* would, if applied to, have disclosed the fact of there being two fresh incumbrances, or whether, if required to furnish an abstract continued down to August, 1857, he would have concealed these facts, it is not, in my opinion, material now to consider. If

he had done so, and wilfully and knowingly deceived Mr. *C. A. Govett* by assertion of what was false, or by the suppression of what was true, it might have altered the character of the case and the liability of the trustees. But the trustees are bound to employ competent persons, and if they do not the loss must fall on them. The reason which Mr. *Govett* gives for not asking for a fresh abstract is singularly inappropriate: it is that he had already got it. This is true, but it came down to October, 1855. What he wanted was an abstract down to August, 1857, or, if he dispensed with that, he should have required a statutory declaration that no fresh charge had been created on the property. All this he neglects, yet he takes a liquidated sum for costs, as if he had gone regularly through the investigation of the title afresh, in the ordinary manner. The valuation, also, is very unsatisfactory. Mr. *Govett*, for this first mortgage, employed Mr. *Petherick* on the recommendation of the mortgagor's solicitor, and he appears to me to have valued the property considerably above its real value; but this is not so material as the omission to require that an abstract should be furnished bringing the title down to the time of the transaction in question, or, if not, that proper evidence should be furnished that no further incumbrance had been created prior to the 3rd of August, 1857, when the trustees were about to advance the money. If the trustees of the *Hopgood* family had paid off the mortgage to *Govett's* trustees, and taken an assignment of it as a subsisting mortgage, it would have been different; but they do nothing of the sort, they only require evidence to shew that the first mortgage to *Govett's* trustees had been paid off; and without anything to shew that fresh incumbrances had not been created, and thus without evidence and without inquiry, they advance the money at once, obtaining only a second mortgage on a property insufficient even for a first incumbrance to that amount. I use the expression "they do this," because it is exactly the same if it be done by the trustees themselves personally or by an incompetent or negligent agent. They must, therefore, bear the loss, and not the *cestuis que trust*, whom they were appointed to protect.

The consequence is that I must make a decree compelling the surviving trustee, Mr. *Parkin*, and the executors of the deceased trustee, *Robert Govett*, to make good the loss sustained by the

M. R. 1870 HOPGOOD v. PARKIN.

trust fund in the circumstances I have above detailed of its having been advanced on an insufficient security; for which purpose the proper and necessary accounts must be taken, with liberty to the Chief Clerk to adopt the accounts taken in the suit of *Hopgood* v. *Ernest;* and if the executors of *Robert Govett,* the deceased trustee, do not admit assets sufficient for this purpose, there must be the usual account of his estate, and the trustees must pay the costs of this suit. Of course I shall give *C. A. Govett* no costs; but I cannot make him pay anything in this suit.

Nov. 21. The above decision was appealed against; but an agreement for a compromise of the suit was entered into, and on this day was sanctioned by the Lords Justices on behalf of the infant Plaintiffs and the representatives of the deceased trustee.

Solicitors: Messrs. *Combe & Wainwright;* Messrs. *Church, Sons, & Clarke;* Messrs. *Phelps & Bennett.*

M. R. 1870 Dec. 3, 6, 9.

In re SEWELL'S ESTATE.

Will—Construction—Wasting Property—Implied Discretion for Conversion—Discretion of Trustees.

Post 443

A testator, after a specific bequest, gave all his residuary estate, both real and personal, to trustees (whom he also appointed executors) upon trust, as soon as conveniently might be after his death, to sell so much and such part thereof as they might think necessary for paying all his mortgage and other just debts and funeral and testamentary expenses; and he directed the trustees, out of the moneys to arise from such sale and other his residuary estate, to pay all such sums of money as might at the time of his decease be charged on his freehold or leasehold estates by way of mortgage and all other his just debts and funeral and testamentary expenses, and to invest so much of the moneys as might remain after such payments; and to stand possessed of such investments and all other his residuary estate and the income thereof upon trust for several persons successively for their respective lives, with remainders over. Part of the testator's residuary estate consisted of a leasehold, which was at the time of his death subject to a mortgage. Shortly after the testator's death, the trustees paid off the mortgage out of the testator's estate:—

Held, that, upon the construction of the will, the trustees had a discretion

as to what part of the testator's estate should be converted; that the Court could not interfere with such discretion, at all events if a considerable time had elapsed since it had been exercised; and that the tenants for life were entitled to enjoy the leaseholds in specie.

M. R.
1870
In re SEWELL'S ESTATE.

CHARLES SEWELL, by his will, dated the 5th of January, 1847, made a specific bequest to his wife, and then proceeded as follows: "And as to all the rest, residue and remainder of my estate and effects whatsoever and wheresoever, I give, devise, and bequeath the same unto and to the use of my sons *Thomas Haywood Sewell* and *John Sewell* and my daughter *Elizabeth Margaret Sewell*, their heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively, upon trust that they and the survivors and survivor of them, and the heirs, executors, administrators, and assigns of such survivor do and shall as soon as conveniently may be after my decease sell and convert into money so much and such part thereof as in their sole discretion they may think necessary for the purpose of paying and discharging all my mortgage and other just debts and funeral and testamentary expenses. . . . And I declare that the trustees or trustee for the time being of this my will shall, with and out of the moneys which shall arise from such sale and other my residuary estate, pay and discharge all costs, charges, and expenses attending such sale or sales, and all such sum or sums of money as may at the time of my decease be charged on my freehold and leasehold estates by way of mortgage, and all other my just debts and funeral and testamentary expenses, and shall lay out and invest so much of the moneys, if any, to arise from such sale as shall remain after such payments as aforesaid," in manner therein mentioned; "and I declare that the trustees or trustee for the time being of this my will shall stand possessed of the said trust moneys so to be laid out and invested as aforesaid, and of the stocks, funds, and securities in or upon which the same shall from time to time be invested, and of all other my residuary estate, and of the annual produce thereof respectively, upon trust that they the said trustees or trustee for the time being do and shall pay the annual produce of the said trust moneys and premises unto or permit and suffer or authorize and empower my said wife *Margaret Sewell* and her assigns to receive the same for and during the

M. R. 1870. *In re* SEWELL'S ESTATE.

term of her natural life, and from and after the decease of my said wife, upon trust to pay the annual produce of the said trust moneys and premises unto my three daughters, *Elizabeth Margaret Sewell*, *Ann Frances Sewell*, and *Caroline Gordon Sewell*, during their joint lives, and to the survivors and survivor of them during their or her life; and from and after the decease of the survivor of my said wife and daughters, upon trust that the said trustees or trustee for the time being, and the survivors or survivor of them, and the heirs, executors, and administrators of such survivor shall and do stand possessed of and interested in the said trust moneys and premises, and the annual produce thereof, in trust for my three sons, *Thomas Haywood Sewell*, *John Sewell*, and *Henry William Sewell*, and their respective heirs, executors, administrators, and assigns in equal shares."

The testator died on the 3rd of February, 1851; his wife predeceased him.

The residuary estate of the testator included certain leaseholds, which at the time of his death were subject to a mortgage. This mortgage was paid off by the trustees out of the testator's estate in October, 1851, and the income of the leaseholds was afterwards paid to the tenants for life under the will.

Recently the *London and North Western Railway Company* took part of the leaseholds for the purposes of their undertaking, and paid the purchase-money into Court. At the time when the leaseholds were so taken there were seventeen years to run of the lease for which they were held; and the tenants for life now presented a Petition praying for payment to them during their lives, out of the purchase-money, of such an annuity as would at the expiration of the lease exhaust the whole amount of the purchase-money.

Mr. *Jessel*, Q.C., and Mr. *Martineau*, for the Petitioners, submitted that the testator had shewn an intention to exclude the operation of the rule in *Howe* v. *Earl of Dartmouth* (1). The testator directed his trustees to sell so much of his estate as might in their discretion be necessary for payment of the mortgage debts secured on his freehold and leasehold estates. Why was this

(1) 7 Ves. 137.

direction given, unless in order that the leaseholds might be enjoyed in specie?

Mr. *Marten*, and Mr. *Charles Walker*, for the remaindermen, contended that the object of the direction was only to clear the testator's estate, that the rule in *Howe* v. *Earl of Dartmouth* (1) was not excluded, and consequently that the tenants for life were not entitled to enjoy the leaseholds in specie.

[They referred to *Morgan* v. *Morgan* (2), *Sutherland* v. *Cooke* (3), and *Re Llewellyn's Trust* (4).]

Mr. *Speed*, for the railway company.

Mr. *Martineau*, in reply.

Dec. 9. LORD ROMILLY, M.R.:—

This is a case upon the construction of a will; and the question is, whether the rule in *Howe* v. *Earl of Dartmouth* does or does not apply.

The testator gives certain chattels to his wife, and then proceeds: "And as to all the rest, residue and remainder of my estate and effects whatsoever and wheresoever, I give, devise, and bequeath the same unto and to the use of my sons *Thomas Haywood Sewell* and *John Sewell* and my daughter *Elizabeth Margaret Sewell*, their heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively"—that obviously includes everything—"upon trust that they and the survivors and survivor of them, and the heirs, executors, administrators, and assigns of such survivor do and shall as soon as conveniently may be after my decease sell and convert into money so much and such part thereof as in their sole discretion they may think necessary for the purpose of paying and discharging all my mortgage and other just debts and funeral and testamentary expenses."

Now it is to be observed that this is not a trust to sell the whole estate of the testator, nor is it a trust to sell so much as would be

(1) 7 Ves. 137.
(2) 14 Beav. 72.
(3) 1 Coll. 498.
(4) 29 Beav. 171.

M. R. 1870 *In re* SEWELL'S ESTATE.

sufficient to pay the debts, but it is a trust to sell such parts, and so much as should be necessary, in the sole discretion of the trustees. The words to that effect are very distinct. Assuming that, on the death of the testator, the trustees in their discretion thought fit to sell all the leaseholds, and not one of the freeholds, could any one of the persons interested prevent it, and say that the Court ought to interfere, though the testator gave them sole and absolute discretion? Would any one have the power to say that all must be sold, both freeholds and leaseholds, or that equal proportions of each must be sold? I think it is clear they would not. Take the converse of that case. The three executors, the two sons and the daughter, in their discretion determine to sell the freeholds, and not to sell the leaseholds. Could this Court interfere? Do not the words give an express and absolute discretion as to what they might think fit to do; and might not that discretion be regulated by various circumstances relating to the state of the family; and would this Court thereupon say, "We will interfere and say you shall not do what you think right, but we will do it for you?" I am of opinion that there is no case which comes to that. No doubt, if they refuse to exercise their discretion, it is settled by many cases that, if the matter comes into this Court, the Court will sell the whole and divide it equally, but I do not think this Court has interfered with the discretion of the trustees when they have chosen to exercise it.

Now not only have they chosen to exercise it, but they have actually exercised it, and have done what they thought fit in this matter. The testator died in 1851, so that nearly twenty years have elapsed since his death, and since this exercise of discretion has been carried into execution, and no step taken in consequence of it. It is a very serious thing to disturb what has been done under the discretion of trustees after a long period of time.

Then I am struck also with this: What are they to do with the money arising from the sale? They are to pay off the mortgages. Some of the mortgages are mortgages of the leaseholds and some of them of the freeholds. Are they or not to be treated differently? It was suggested to me in argument by Mr. *Marten*, that to pay off the mortgages merely meant, you are to sell the leaseholds free from incumbrances, discharged from the mortgages. I do not

think that is so. That would be putting a very strained meaning upon the words, because this occurs—"And I declare that the trustees or trustee for the time being of this my will shall, with and out of the moneys which shall arise from such sale and other my residuary estate, pay and discharge all costs, charges, and expenses attending such sale or sales, and all such sum and sums of money as may at the time of my decease be charged on my freehold and leasehold estates by way of mortgage, and all other my just debts and funeral and testamentary expenses, and shall lay out and invest so much of the moneys (if any) to arise from such sale as shall remain, after such payments as aforesaid," upon certain trusts. He declares that the trustees are out of the produce of the sale to pay off the mortgages upon the freehold and leasehold estates. I cannot treat them differently: the mortgages are alike to be paid off, and to be paid off out of the proceeds of the sale. That does not mean that his property itself, which is charged with a mortgage, is to contribute and form part of that produce. I am therefore of opinion that there is sufficient in this will, and from the various circumstances which exist, to say that the discretion of the trustees is left entirely with them, and that they have exercised it in a particular way. That which they have done nineteen years ago has not been interfered with in the slightest degree, and it is too late now to come and say, "That was an improper exercise of your discretion, and you ought to have exercised it differently." I think, therefore, that these ladies are entitled to the property, that is the leaseholds, in specie.

Solicitors: Messrs. *Walker & Martineau;* Messrs. *Houghton & Wragg;* Messrs. *Brooks & Co.;* Messrs. *Hayes, Twisden, & Co.*

M. R. 1870 Dec. 3, 5.

In re CONSTANTINOPLE AND ALEXANDRIA HOTEL COMPANY.

REIDPATH'S CASE.

Company—Winding-up—Contributory—Notice of Allotment—Posting Letter.

Mere posting of a letter of allotment of shares in a company to an applicant at the proper address is not such a communication of the allotment as to bind the applicant.

ON the 23rd of October, 1863, *Thomas Reidpath* applied in writing for thirty shares of £20 each in the *Constantinople and Alexandria Hotel Company, Limited*, and he gave as his address, 7, *Stamford Grove East, Upper Clapton*. On the 21st of December, 1863, thirty shares were allotted to him. It was proved that on the same day letters of allotment to the applicants on a certain list (including a letter of allotment to *Reidpath*) were posted to the proper addresses.

No deposit was required to be paid on application for shares in the company, but a call of £1 per share became payable on allotment. This call, however, was not paid by *Reidpath* and other allottees. There was some evidence that letters requiring payment of the call from the defaulting allottees were posted to the proper addresses on the 4th of January, 1864; and it was strictly proved that letters from the solicitors of the company to the allottees on a certain list (including a letter to *Reidpath*), requiring immediate payment of the call, and of a further sum of 6*s.* 8*d.* (the costs of the application), and threatening legal proceedings in default of payment, were posted to the proper addresses on the 25th of July, 1864.

No call other than that payable on allotment was ever made.

The company was ordered to be wound up in 1865. *Reidpath* was placed on the list of contributories, but by some mistake under the name of *John* instead of *Thomas*, although the name was correct in the register of shareholders; and the mistake was not discovered until it became necessary to issue a balance-order. Immediately on the discovery of the error the liquidator took out

a summons for the purpose of settling *Thomas Reidpath* on the list of contributories, and this application was adjourned into Court.

Reidpath, who was a stockbroker, by his affidavit admitted that he sent in the application for shares, and that he continued to reside at the address therein given down to March, 1866; but he denied that he ever received any letter of allotment or any application of any kind in respect of the call payable on allotment, or letter or notice of any kind from the company or the secretary thereof, or any person connected therewith.

Mr. *Roxburgh*, Q.C., and Mr. *Bevir*, for the official liquidator:—

We prove all that is necessary to constitute an agreement to take shares, viz., an application, an allotment, and the posting of a letter of allotment to the proper address. It is not necessary to prove that the letter actually reached *Reidpath*, for in these cases the post-office must be taken to be the agent of the applicants for shares to receive on their behalf notice of allotment: *Dunlop* v. *Higgins* (1); *Duncan* v. *Topham* (2).. At all events, we say that the balance of probability is in favour of the presumption that one out of three letters sent to *Reidpath* at the proper address was delivered to him; and in *Ebbetts' Case* (3), Lord Justice *Giffard*, on the same evidence as we have in this case, came to the conclusion that the applicant had received notice of allotment.

Mr. *Southgate*, Q.C., and Mr. *J. H. Warner*, for *Reidpath*:—

It is necessary to prove that the allotment was communicated to the applicant: *Gunn's Case* (4); *Robinson's Case* (5). That has not been done. The cases cited do not prove that mere posting of a letter is equivalent to notice. *Dunlop* v. *Higgins* merely decides that where an offer is accepted by letter, and that letter is delivered, the acceptance dates from the posting of the letter; but it does not decide that there would have been a contract between the parties if the letter had never been delivered. *Duncan* v. *Topham* was decided on other grounds. In *Ebbetts' Case*

(1) 1 H. L. C. 381.
(2) 8 C. B. 225.
(3) Law Rep. 5 Ch. 302.
(4) Ibid. 3 Ch. 40.
(5) Law Rep. 4 Ch. 330.

M. R. 1870 — REIDPATH'S CASE.

the Lord Justice evidently disbelieved the evidence of *Ebbetts*, and he had good grounds for so doing, but no such grounds exist here. If the theory that posting a notice is sufficient communication be correct, why were sects. 62 and 63 introduced into the *Companies Act*, 1862?

Mr. *Roxburgh*, in reply.

Dec. 5. LORD ROMILLY, M.R.:—

I do not think in this case that there is sufficient proof that the acceptance was communicated to Mr. *Reidpath*. Evidence of the letter being posted is not enough to fix him. No notice whatever is taken by him, and nothing is done upon the subject for several years. I think this case is quite distinct from the case in the same company, which went before the Lord Justice *Giffard*, who affirmed my judgment in the matter. In that case it was obvious that the party never thought of raising the question in the Court below, and did not raise it till he got into the higher Court. Am I to lay down a positive rule that every letter that is sent by post is delivered, and that every person must be held responsible, whether it is or is not delivered? There may be many accidents to prevent its being delivered. In this case we know that the word "*Thomas*" has, by mistake, been turned into "*John*," and if by any accident a letter was not delivered at the time, then am I to hold that the person to whom it is addressed is bound by all the consequences, just as if he had received the letter and had assented to it. I cannot say that I find any case which lays down such a rule; and I think it is inconsistent with the clauses in this Act of Parliament, where the Legislature has enacted in certain cases that a letter put into the post shall be sufficient notice. I do not think anything else arises in the case, but simply the question whether the letter came to the hands of this gentleman or not. How am I to determine that question? It is sworn positively by him that none of the letters ever came to him; as to one letter, I do not think there is sufficient proof, but of two letters there is distinct proof of their having been put into the post. I am not

sure that they were delivered. I am not sure that they were correctly directed in fact, but I see no reason for imputing perjury to this gentleman when he says positively he never received the letters. With respect to the letter in which the solicitor calls upon him to pay, and says, "If you do not pay the amount, together with 6*s.* 8*d.* for our charges, within four days you shall have an action brought against you," I think if he had received it he would have taken some notice of that letter; yet if he did receive it, he took no notice of it, and when the winding-up takes place he treats it as a matter in which he has no species of concern. The winding-up order is made in 1865, and it is not till 1870 that he is called upon to pay any calls. In the meantime he acts as if he knew nothing about it. I do not think that the time alone would seriously affect the case, but his making no inquiry, and saying and doing nothing, is strong evidence to shew that he considered he had no interest in the concern, and that he had never received the letters. The real question is, on whom does the burden of proof lie? It is admitted that there are three things which constitute the contract, the application for shares, the allotment of the shares, and the notice of the allotment. The two first it is not necessary to consider in this case; but who ought to prove the notice of the allotment? I apprehend the company ought to prove that. Does the fact of putting the notice in the post-office sufficiently prove it? I find no case which has laid down that rule, and the cases referred to do not amount to it. I do not think I should be at liberty so to hold in opposition to the distinct and positive oath of the Respondent, who says he never received the letters. In this state of circumstances I cannot fix him as a contributory.

15 Eq 19

Solicitors: Messrs. *Routh & Stacey;* Messrs. *Farmer & Robins.*

M. R.
1870
Dec. 7.

CANNON *v.* JOHNSON.

Practice—Partition Suit—Costs.

The costs of a partition suit up to the hearing, as well as the subsequent costs, should, in the absence of special circumstances, be borne by the several parties in proportion to their interests, as declared by the decree.

THIS was a partition suit, by the decree in which the Plaintiff was declared to be entitled to one-fifth and the Defendants to four-fifths of certain property.

The case now came before the Court on further consideration; and the question was, how the costs were to be apportioned.

Mr. *Jessel*, Q.C., and Mr. *A. E. Miller*, for the Plaintiff, contended that, since the *Partition Act*, 1868 (31 & 32 Vict. c. 40), s. 10, by which the costs were to be at the discretion of the Court, the old practice was no longer subsisting, and that the costs up to the hearing, as well as the subsequent costs, should be borne by the parties in proportion to their respective interests.

Mr. *Davey*, for the Defendants, contended that the old practice, as laid down in *Agar* v. *Fairfax* (1), still prevailed, and that each party should bear his own costs up to the hearing.

Lord Romilly, M.R.:—

I am satisfied that, according to the practice which I have followed on several previous occasions, the entire costs of a partition suit should be borne by the parties in proportion to their interests, as declared by the decree, except where there are any special circumstances arising from the conduct of any of the parties which may lead the Court to apportion the costs otherwise.

In this case the Plaintiff must pay one-fifth and the Defendants four-fifths of the entire costs of the suit.

Solicitors for the Plaintiff: Messrs. *Duncan & Murton.*

Solicitors for the Defendants: Messrs. *Paterson, Snow, & Burney.*

(1) 17 Ves. 533.

HOLLAND *v.* WOOD.

V.-C. S.
1870
Nov. 5.

Will and Codicil—"Children or Legal Issue"—"Or" and "and."

Testator devised lands to his daughter *A.* in fee, and by codicil he ordered that the lands given by his will to *A.* should be not so given, but to all the children or legal issue of *A.*, to be divided amongst them in equal shares, after the decease of his daughter *A.* and her husband. She had ten children, one of whom died in the lifetime of the testator, and three, who survived him, died in her lifetime:—

Held, that the children of *A.*, who were living at the death of the testator, and those who were born afterwards, took vested interests in fee, to the exclusion of grandchildren and great-grandchildren.

5th D. 99

GEORGE WARD, who died in January, 1811, by will, dated the 8th of August, 1808, devised his lands at *Bratoft*, and other places, to the use of his wife for life, and after her decease he devised one part of these lands unto and to the use of his daughter *Ann*, the wife of *William West*, her heirs and assigns for ever, and the other part unto and to the use of his daughter, *Elizabeth Ward*, her heirs and assigns for ever.

By a codicil, made on the 19th of August, 1808, the testator said, "I order that all the messuages, lands, tenements, and hereditaments, as given by mè in my last will and testament to my daughter *Ann*, the wife of *William West*, and to her and her heirs or assigns for ever, be not so given, but to all the children or legal issue of my said daughter *Ann*, the wife of *William West* aforesaid, to be divided between and amongst them in equal and proportional shares after the decease of the said *William* and *Ann West*. And also I order that all the messuages, lands, tenements, and hereditaments as given by me in my last will and testament to my daughter *Elizabeth Ward*, her heirs and assigns, for ever, be not so given, but to her legal issue, to be divided between and amongst them in equal and proportional shares, &c., &c.; but provided the said *Elizabeth Ward* happens to die without leaving any legal issue, in that case my will is, and I hereby direct that the above-mentioned messuages, lands, tenements, and hereditaments be divided in equal and proportional shares amongst the children and legal issue of my said daughter *Ann*, the wife of *William West*

V.-C. S. 1870 HOLLAND v. WOOD.

aforesaid." *William West* died in 1819. The widow of the testator died in 1830. *Ann West* died on the 7th of March, 1867. She had by her husband *William West* ten children, one of whom died in the lifetime of the testator, an infant and unmarried, and three children, who survived the testator, died in the lifetime of their mother. Two of these three children died infants and unmarried, and the other child (*Eleanor Wheldale*) married and died, leaving three children, two of whom had died since their father and mother, infants without issue, leaving the survivor their heiress-at-law.

The remaining six children of *Ann West* married and had children, and some of them grandchildren, and all were made Defendants to this suit, as they claimed to be entitled to shares in the lands so devised to the children or legal issue of *Ann West*.

The bill was filed by the devisee in trust of *Frederick Cooke*, who died in 1867, and who had become the purchaser of certain of the shares, or presumptive shares, of some of the children, and he prayed for a declaration that he was entitled to have a partition made of the lands, or that they might be sold under the direction of the Court, and that the proceeds of such sale might be divided amongst the Plaintiff and the other parties interested therein, according to their respective rights.

Mr. *Charles Hall*, and Mr. *Speed*, for the Plaintiff:—

This case is not governed by any precise authority. The devise by the codicil is in favour of the children of *Ann West*, and the grandchildren and great-grandchildren are excluded. The testator meant in using the words "children or legal issue," lawful children of his daughter, and he did not intend to enlarge the class so as to include all the descendants of his daughter. There are no words which import a contingency, but upon the death of the testator the children of his daughter who survived him took vested interests, though the period of distribution amongst or enjoyment by them was postponed till after the death of his daughter and her husband.

Mr. *Dickinson*, Q.C., and Mr. *Shebbeare*, for some Defendants, and Mr. *Cates*, for another Defendant, who took the same view as the Plaintiff.

Mr. *Laing*, for *George*, the eldest son of *Ann West*:—

The testator, by his codicil, created an estate tail. He did not revoke the devise by his will to *Ann West*, but he ordered that the lands which he had given by his will to her and her heirs should "be not so given, but to all her children or legal issue." *Primâ facie*, "issue" is a word of limitation: *Tate* v. *Clarke* (1); *Doe* v. *Rucastle* (2); and in the more modern authorities the word has been construed as meaning "heirs of the body:" *Roddy* v. *Fitzgerald* (3); *Kavanagh* v. *Morland* (4); and should it be contended that the use of the word "children" creates a distinction, the answer would be that the testator in *Roddy* v. *Fitzgerald* used the word "child," and that notwithstanding the House of Lords decided that the first devisee took an estate tail. Unless the testator has given a different meaning to it, the Court must give force to the word "issue." *Jesson* v. *Wright* (5), where the word "child" was used by the testator, was a similar case to this, and there it was held that an estate tail was created. *William West* took no estate for life, except by implication, and there is no necessity for holding that he took one by implication: *Drew* v. *Killick* (6); *Aspinall* v. *Petvin* (7); *Rex* v. *Inhabitants of Ringstead* (8); *Stevens* v. *Hale* (9); *Hawkins* on Wills (10); *Jarman* on Wills (11). For as *Ann West* took an estate of inheritance in fee or in tail, so *William West* would, if he had survived her, have taken an estate as tenant by the courtesy. In the case of *Elizabeth Ward*, the devise was to her legal issue, with a gift over in case she should die without any legal issue in favour of "the children and," not "or," legal issue of *Ann West;* and as to that devise, *Roddy* v. *Fitzgerald* is precisely in point, and *Lewis* v. *Puxley* (12) supports the contention that both daughters took estates tail. The testator, by his codicil, modified the estates in fee given by his will. There was no gift of the fee to the children of *Ann West*. If they take estates at all they will be for life only: *Doe* v. *Thomson* (13); *Doe*

(1) 1 Beav. 100.
(2) 8 C. B. 876.
(3) 6 H. L. C. 823.
(4) Kay, 16.
(5) 2 Bli. 1.
(6) 1 De G. & Sm. 266.
(7) 1 S. & S. 544.
(8) 9 B. & C. 218.
(9) 2 Dr. & Sm. 22.
(10) Page 178.
(11) 3rd Ed. vol. i. p. 497.
(12) 16 M. & W. 733.
(13) 12 Moo. P. C. 116.

V.-C. S. 1870 HOLLAND v. WOOD.

v. *Rucastle* (1); and after their deaths the fee will belong to the eldest son of *Ann West*. But, in fact, there is nothing to take this case out of *Roddy* v. *Fitzgerald* (2) and *Doe* v. *Rucastle*. The only difference between those cases and this is, that the words "children or legal issue" are used instead of "legal issue" only; but it may be said that these words include "children" and a larger class than children; and if it should be decided that the mere use of the word "children" makes a difference, great uncertainty will prevail and litigation be produced.

[*Wood* v. *Baron* (3) was also cited.]

Mr. *A. Thomson*, for Defendants, including grandchildren and great-grandchildren of *Ann West*:—

I oppose the contention urged on behalf of the children and the eldest son.

[The VICE-CHANCELLOR:—I will not trouble you to argue that there is not an estate tail.]

It will be easy to shew, both upon principle and the authority of decided cases, that the children who survived the testator, and the descendants of them, who came into existence between his death and that of *Ann West*, in 1867, are entitled to shares in this estate. What the testator intended is clear, and though he, in the codicil, used the word "or," he meant "and," and so it ought to be read for the purpose of carrying his intention into effect. The cases of *Richardson* v. *Spraag* (4), *Eccard* v. *Brooke* (5), *Horridge* v. *Ferguson* (6), and *Maude* v. *Maude* (7), distinctly establish that under a gift, as in this case, if at the time when the class is to be ascertained there are grandchildren and great-grandchildren living, they all take *per capita*; and those cases follow the decisions in *Davenport* v. *Hanbury* (8) and *Leigh* v. *Norbury* (9), where it was held that the word "issue," unconfined by any indication of intention, includes all descendants, and that they take *per capita*. The intention of the testator was, that his

(1) 8 C. B. 876.
(2) 6 H. L. C. 823.
(3) 1 East. 259.
(4) 1 P. Wms. 434.
(5) 2 Cox, 213.
(6) Jac. 583.
(7) 22 Beav. 290.
(8) 3 Ves. 257.
(9) 13 Ves. 340.

daughter, *Ann West*, should take an estate for life, and that her children and all their issue should, in equal and proportional shares, take the fee; and such a construction would be in accordance with the decision in the recent case of *In re Harrison's Estate* (1), which governs this case.

Mr. *Greene*, Q.C., and Mr. *Villiers*, for other Defendants in the same interest:—

The proper construction of such a will and codicil as in this case would be that which would include the largest class—to give shares of the estate to all the descendants of *Ann West* who came into existence before the date of her death—the period of distribution. There can be no doubt that the testator used the word "or" in the codicil by mistake for "and;" and to construe the gift as one to *Ann West's* children and legal issue would be to give full application to the case of *Wood* v. *Baron* (2), and a substantial benefit to all her descendants. Any other construction would not comply with the testator's intention.

Mr. *Nalder*, for the surviving child of *Eleanor Wheldale*, submitted that the words "children or legal issue" ought not to be extended beyond the immediate issue of *Ann West's* children who died in her lifetime, and that this surviving child took by substitution the share which her parent would have taken: *Pearson* v. *Stephen* (3); *Shailer* v. *Groves* (4); *Girdlestone* v. *Doe* (5); and *In re Porter's Trust* (6).

Sir John Stuart, V.C.:—

No case has been cited which governs the present.

I have no difficulty in understanding the language which this testator has used. By his will he devised lands in fee to his daughter *Ann*, the wife of *William West*, and by his codicil he, in plain language, altered that gift. By the codicil he devised nothing expressly to his daughter and her husband. It is immaterial to consider whether they took estates for their lives by implication;

(1) Law Rep. 5 Ch. 408.
(2) 1 East. 259.
(3) 5 Bli. (N.S.) 204.
(4) 6 Hare, 162.
(5) 2 Sim. 225.
(6) 4 K. & J. 188.

V.-C. S. 1870 HOLLAND v. WOOD.

but, in my opinion, they were entitled to life estates. The testator, by his codicil, ordered that all the lands should not be so given as by the will, but to all the children or legal issue of his daughter *Ann*, to be divided amongst them equally after the deaths of herself and her husband.

It was contended that the word "or" should be read "and;" but in all the cases where the Court has so read the word it was plain from the context that the wrong word had been used. There is nothing in the context here to shew that "or" is the wrong word. The words "children or legal issue" mean that where there are children they are to take the lands, and that where there are not children who can take the issue are to take, and that construction gives a plain, sensible meaning to the language of the testator. The enjoyment of the gift is postponed; they were not to have their shares till after the death of their mother and her husband. The postponement of enjoyment imports no contingency. If the view adopted in the case of *Aspinall* v. *Petvin* (1) should be allowed to prevail here, it might be considered that there was an intestacy. But that question is now unimportant, for all that I have to do is to consider what are the rights of the "children or legal issue," and I feel bound to declare that the word "children," which is plain and intelligible, means the children of *Ann West* only; and necessarily, according to the established rules of construction, includes all those who answer that description and who came into *esse* before the period of enjoyment. Mr. *Laing*, in an ingenious argument, and by reference to authorities, endeavoured to shew that *Ann West* took by the codicil and will combined an estate tail, on the ground that the word "issue" is one of limitation. He would not say that "children" is a word of limitation, but that was involved in his argument. The words used by the testator must be construed in accordance with the context, and there is nothing to shew that the word "children" must be construed as one of limitation. Declare that, according to the true construction of the will and codicil, the children of *Ann West*, who were living at the death of the testator, and those who were born afterwards, took vested interests in the lands in fee; and having regard to that declaration, there must be inquiries to ascertain the number of

(1) 1 S. & S. 544.

children born during her life, and who are now entitled to shares in the lands. The lands must be sold under the direction of the Court; and the bill, as against those Defendants who have no interest in the lands, is dismissed, their costs to be paid out of the proceeds of the sale.

V.-C. S. 1870 HOLLAND v. WOOD.

Solicitors: Mr. *H. S. Williams*, agent for Mr. *O. T. Alger*; Messrs. *Abbott, Jenkins, & Abbott*, agents for Mr. *F. T. White, Boston*; Messrs. *Sharp & Ullithorne*, agents for Mr. *J. Walesby, Horncastle*; Mr. *H. S. Williams*, agent for Messrs. *Walker, Sons, & Rainey, Spilsby*; Messrs. *Coverdale, Lee, & Co.*, agents for Messrs. *Simpson & Millington, Boston.*

In re BLOWER'S TRUSTS.

V.-C. S. 1870 *Nov.* 18.

Will—Great-Nephew sharing with Nephew.

Gift by will of proceeds of sale of an estate to testator's great-nephew, and to such other of his nephews and nieces as should be living at his own and his sister's decease, equally:—

Held, that the great-nephews and great-nieces were entitled equally with the nephews and nieces, as being classed with the great-nephew.

15 Eq 306

Reversed by L.J. 6 Ch 851.

WILLIAM BLOWER, who died in 1844, by his will, made in December, 1842, devised an estate to trustees until his great-nephew *Langford Wilson* should attain the age of twenty-one years, upon the trusts therein expressed, and so soon as his said great-nephew attained that age he devised the same unto his said great-nephew *Langford Wilson*, his heirs and assigns. The testator then devised another estate to the trustees, and after directing them to pay the rents and profits to a sister for life he directed them to sell this estate, and then said, that "as to the net moneys to arise from the sale of my said real estate I direct that the same shall be vested in my said trustees," after paying expenses, "upon trust to pay thereout all my mortgage debts which may be owing by me upon any part of my said real estates (it being my wish and desire that the estate hereinbefore devised for the benefit of my said great-nephew *Langford Wilson* shall be free from any part of such debts), and after payment thereof upon trust to pay and divide the remainder of the said trust moneys unto and between

V.-C. S. 1870 *In re* Blower's Trusts.

my great-nephew *George William Wilson* and to such other of my nephews and nieces as shall be living at mine or my said sister's decease, in equal shares and proportions."

The estate was, after the death of the sister, sold, and the residue of the proceeds, after paying the mortgage debts and expenses, had been paid into Court. There were six nephews and nieces and fourteen great-nephews and great-nieces of the testator.

George William Wilson died in 1859.

The nephews and nieces now asked by Petition that the fund in Court might be paid to them and to the legal personal representative of *George William Wilson.*

Mr. *Dickinson*, Q.C., and Mr. *Freeling*, for the Petitioners:—

The question is, whether the expression of the word "great" in the clause of disposition of the residue take away from the words "nephews and nieces" their primary signification. The testator has used the designation "great-nephew" in its proper place, and he gave nothing to any great-nephew or niece except to the two named. One rule of construction is that, unless there is a reason for the contrary, the words used by a testator shall have their primary and general signification; and another rule is, that where there are persons who come within such primary and general signification they shall take to the exclusion of all others. The cases to which attention ought to be called are *Shelley* v. *Bryer* (1), *Crook* v. *Whitley* (2), and *Thompson* v. *Robinson* (3), and they support the view of the Petitioners. In *Weeds* v. *Bristow* (4) it was held that grand-nephews and grand-nieces were entitled to participate in the gift to nephews and nieces; but that case is different from the present, and is no authority for a like decision being made here; and, considering the decisions in the other cases, it cannot be held that the mere introduction by the testator of the word "great" in one line of his will, and in its proper place, is sufficient to defeat the primary signification of the words "nephews and nieces." The testator correctly described the *Wilsons* as his great-nephews, but that does not affect the question, for he also correctly described the class that he intended should take the residue, viz.,

(1) Jac. 207.
(2) 7 D. M. & G. 490.
(3) 27 Beav. 486.
(4) Law Rep. 2 Eq. 333.

3 Jur. N.S. 705.

his nephews and nieces, with his great-nephew *George William Wilson*.

[*Smith* v. *Lidiard* (1) was also cited.]

Mr. *Boger*, for two Respondents in the same interest:—

It is a remarkable fact that the testator used the word "great-nephew" in many places in his will, while he only used the word "nephews" once, and therefore it is fair to assume that if he had intended the great-nephews and great-nieces to share in the residue he would have repeated the word "great" in its proper place; besides, the gift was "to such other of his nephews and nieces," which plainly shewed that that class only should receive a benefit.

Mr. *Karslake*, Q.C., and Mr. *Badcock*, for the great-nephews and great-nieces, were not called upon.

Mr. *W. Pearson*, for the trustees.

SIR JOHN STUART, V.C.:—

No doubt the authorities which bear upon this case conflict, but those which are in favour of admitting the great-nephews and great-nieces to share in the residue greatly preponderate. The decisions which have excluded great-nephews and great-nieces from participating have proceeded upon the consideration that the words were used in an erroneous sense; but I think it would be a strong thing to say, that because a word has not been used in its strict sense, therefore the bequest ought to fail. We are all quite familiar with the fact that great-aunts are commonly called "aunts," but that is an error of extremely small importance. Sir *Thomas Plumer*, in the case of *Shelley* v. *Bryer* (2), does not seem to have thought very highly of his own opinion, for he confessed that he was not able to come to a very clear conclusion, and that he was not satisfied with his decision which excluded the great-nephews and nieces. But the facts of that case and the present are very different, and, in my opinion, I cannot exclude the great-nephews and great-nieces here without overruling the case of *James* v. *Smith* (3), where the late Vice-Chancellor of *England* said: "I

(1) 3 K. & J. 252. (2) Jac. 207.

(3) 14 Sim. 214.

V.-C. S. 1870 *In re* BLOWER'S TRUSTS.

take the word 'nieces' to mean only what the testatrix shews she intended it to mean, namely, the daughters of her nephews and nieces." In this case, as the testator spoke of his great-nephew, and classes him with his other nephews and nieces, and the gift is to him and other nephews and nieces, I cannot consider that he excluded those who were as much nephews and nieces as the great-nephew. Declare, that the great-nephews and great-nieces are, with the nephews and nieces, entitled to share in the fund in Court.

Solicitors: Messrs. *Vizard, Crowder, & Co.*

V.-C. S. 1870 *Dec.* 15, 16, 17, 19. 1871 *Jan.* 12.

In re EMPIRE ASSURANCE CORPORATION.

LEEKE'S CASE.

Contributory—Promotion-money—Qualification of Directors—Paid-up Shares.

A director of an old company, agreed to be sold to a promoter on behalf of a new company, was named in the articles of the new company as director, and though he never applied for shares, fifty were allotted to him and registered in his name as paid-up shares, for which the promoter gave a cheque out of several he had received on account of purchase-money stipulated by the articles to be paid to him under a false name, there being in fact no money in hand. The shares were registered as fully paid-up. The director never received the certificates or attended board meetings, or was aware that shares had been allotted to him, but he attended an extraordinary board meeting, at which he described himself as nominal chairman, and excused himself on the score of ill-health from taking part in the affairs of the company. A proxy was used on his behalf, which he denied having given:—

Held, that he was a shareholder for fifty unpaid shares.

THIS was a summons that the name of Admiral *Leeke* might be removed from the list of contributories of a company in course of winding-up, called the *Empire Assurance Corporation, Limited*, in respect of fifty shares in the company. The Chief Clerk, on the 15th of April 1868, had placed Admiral *Leeke's* name on the list. Admiral *Leeke* was a shareholder and director of a company called the *British Union Company*, whose registered office was at 27, *Gresham Street, London*. On the 1st of September, 1865, an

agreement was entered into between *F. J. Price*, *B. Bullock*, and the Hon. *C. E. Hobart*, three of the directors of the *British Union Company*, of the first part, and one *W. Gidley Lake*, on behalf of a new company to be formed, of the second part, whereby, for the considerations mentioned, the parties of the first part agreed to transfer the business of the *British Union Company*, the lease of the premises No. 27, *Gresham Street*, and the name and title of the *British Union*, to the said *Lake* on behalf of the new company; and he, the said *Lake*, on behalf of the said company, agreed to pay to the shareholders of the *British Union* £3000 in the manner and at the times therein mentioned. The agreement contained the following clause: "That such of the shareholders of the said *British Union Company* as like to come in and take shares in the new company shall be entitled to do so, and shall be credited with £1 per share, Admiral *Leeke*, *F. J. Price*, *C. E. Hobart*, and *B. Bullock* agreeing to join the board of the new company."

The new company was accordingly incorporated by the name of the *Empire Assurance Corporation, Limited*, and immediately afterwards, viz., on the 25th of October, an extraordinary general meeting of the *Empire* was held, at which the above agreement was adopted, and the articles of association were amended by providing that an agreement between one *Charles Bevan* and the *Empire*, by which the company agreed to pay *Bevan* £1500, and a provisional agreement that the *Empire* should pay *George Bailey* £10,000, be confirmed. This resolution was confirmed at a meeting held on the 9th of November, 1865.

The *George Bailey* mentioned in the agreement was Mr. *W. G. Lake*.

Admiral *Leeke* was named in the articles of association of the *Empire* as a director. A board meeting of the directors of the company took place on the 20th of November, at which Admiral *Leeke* was not present, when the following resolutions were passed:—

"Resolved, that Admiral Sir *H. Leeke* be, and is hereby duly appointed, chairman of the corporation, and *A. Soares*, Esq., deputy chairman.

"Resolved, that the following shares be forthwith allotted:" (then

V.-C. S. 1870

LEEKE'S CASE.

followed a list of the shares allotted, among which were "Admiral *Leeke*, fifty.")

On the same day it was resolved that cheques should be drawn, after a banking account had been opened, for the moneys voted at the shareholders' meetings of the 25th of October and the 9th of November, 1865. According to the evidence of *Lake*, the shares were treated and registered as paid on the 21st of November, but no money passed. The formal payments were made very shortly after the opening of the banking account; cheques were drawn and signed by Messrs. *Price* and *Soares*, for sums amounting in the whole to £6520, out of the £7500 authorized by the resolutions of the 20th of November, 1865. They were drawn upon the distinct understanding that the proceeds of each cheque should be paid into the company's bankers before another cheque should be drawn, so as formally to make up the payments on the directors' shares, which had been hitherto treated as paid up. *Lake* deposed that he paid £6000, out of the £6500, on the following dates:—

	£
June 14, 1866	1000
„ 16, 1866	1000
„ 19, 1866	500
„ 21, 1866	500
„ 28, 1866	3000

These payments included the amount due on Sir *H. Leeke's* shares. The next board meeting took place on the 12th of December, 1865, at which meeting the minutes recorded that the minutes of the preceding meeting were read over. Admiral *Leeke* was described in the directors' attendance-book as having been present, but Admiral *Leeke* denied that he did attend the board meeting, though he admitted he might have been in the room at the close of the meeting about the affairs of the *British Union*, which were conducted in the same room. The entry in the directors' attendance-book of Admiral *Leeke's* name was at the bottom of the list of the directors present, and a line was drawn between his name and the director's name immediately above his. He was not in the chair.

It was not alleged that Admiral *Leeke* attended any other meeting until the 18th of April, 1867, when a meeting was held at the

Guildhall Coffee House. This meeting was held to consider the propriety of winding up the company voluntarily; and it appeared from a shorthand note that, at the commencement of the meeting, Admiral *Leeke* asked leave to say a few words, in the course of which he said that he might call himself the nominal chairman, and apologized on the ground of ill-health for not having taken more part in the affairs of the company, and suggested that another gentleman (the deputy chairman) should take the chair. In his affidavit, Admiral *Leeke* stated that his reason for not more distinctly repudiating any connection with the company was an apprehension that it might prove injurious to it. He denied that he took part in the meeting or signed a proxy.

It appeared from a paper produced that, on a scrutiny being taken of the votes, Admiral *Leeke* appeared to have voted by proxy.

On the 4th of May, 1867, the company was ordered to be wound up.

About the month of May, 1868, a summons was taken out against Admiral *Leeke* to attend at the settling of the list of contributories, and a gentleman attended for him and other directors, and the matter was adjourned. Admiral *Leeke* swore he was not aware of the meeting, and had never instructed any person to appear for him, and it was not till the service of the balance-order upon him that he was aware proceedings had been taken against him.

It appeared from the evidence that, when cheques were drawn for the directors' fees for attendance, no cheque was drawn for Admiral *Leeke's* fees.

It was admitted that there was no evidence of any application for shares ever having been made by Admiral *Leeke*, and he positively denied ever having applied for shares or having agreed to accept any, or having received any certificates, or that the shares were allotted to him.

Evidence was given, on behalf of the official liquidator, that all the notices had been duly served on the registered shareholders.

Admiral *Leeke* died in the summer of 1869.

Mr. *Hardy*, Q.C. (Mr. *De Longueville Giffard* with him), for the summons:—

Although it is true that the articles of association named Admiral

V.-C. S. 1870

LEEKE'S CASE.

Leeke as a director, and although the other directors, at a board meeting on the 20th of November, 1865, at which Admiral *Leeke* was not present, passed a resolution appointing him chairman, and allotting him fifty shares, Admiral *Leeke* never acted as a director, or was aware that these shares were allotted to him. Assuming even that by attending a subsequent board meeting on the 12th of December (which, however, he denied doing), and a subsequent extraordinary general meeting on the 18th of April, 1867, he must be regarded as being a director, that would not be sufficient to constitute him a shareholder: *Marquis of Abercorn's Cases* (1); *Stock and Roney's Case* (2); *Currie's Case* (3). To constitute him a shareholder there must be at least an acceptance of shares allotted to him, but here there was neither application for shares, acceptance of any shares whatever, nor even knowledge on Admiral *Leeke's* part that any shares had been allotted to him: *Pellatt's Case* (4); *Levita's Case* (5); *G. H. Levita's Case* (6). If, however, Admiral *Leeke* is to be treated as a shareholder, it could only be as the holder of paid-up shares. The issuing of paid-up shares was recognised by the *Companies Act*, 1867, s. 25, as legitimate, but it did not authorize as a new creation paid-up shares, but simply recognised the issuing of paid-up shares as legal. It provided a mode of regulating such issue. The shares were fully paid up by *Lake*, who, under the articles, was to receive £10,000 as promotion-money; and out of £6000, part of such promotion-money, which was actually paid to him by the directors, he did, in fact, *bonâ fide* pay the whole amount of £500 due on the shares allotted to Admiral *Leeke*. It was true that the promotion-money was due to *Lake* under the name of *George Bailey*, but Admiral *Leeke* had nothing to do with this arrangement, which was made by *Lake* and the directors who managed the business. This agreement between *Lake* and the company had not been impeached by any one, and, whatever view might be taken of it, Admiral *Leeke* was no party to it in any way: *Migotti's Case* (7); *Pell's Case* (8).

(1) 4 D. F. & J. 78.
(2) 10 Jur. (N.S.) 790.
(3) 3 D. J. & S. 367.
(4) Law Rep. 2 Ch. 527.
(5) Law Rep. 3 Ch. 36.
(6) Ibid. 5 Ch. 489.
(7) Ibid. 4 Eq. 238.
(8) Ibid. 5 Ch. 11.

Mr. *Dickinson*, Q.C., and Mr. *Brooksbank*, for the official liquidator, were not called upon.

1871. Jan. 12. SIR JOHN STUART, V.C.:—

The motion which is now to be disposed of is, that the name of the late Admiral *Leeke* be removed from the list of contributories.

This application is supported on two grounds.

First, that he never in fact was a shareholder.

Secondly, that if he ever was a shareholder at all, his shares were fully paid.

As to the first ground, I stated during the argument the reasons why I think it wholly untenable. There is the clearest evidence that, having been a shareholder in the *British Union Company*, he was cognisant of the proceedings for the transfer of the business of that company to the *Empire Corporation*, and that it was to be on the footing that he should take the same amount of shares in the *Empire Corporation* which he had in the other; that he was to be the chairman of the *Empire Corporation;* that his name was for several months advertised as such chairman; that he appeared personally at the meeting of the *Empire Corporation* on the 18th of April, 1867, and apologized on the score of ill-health for having been unable to act on previous occasions, or to take the chair himself on that occasion; that on his motion another person took the chair on that occasion in his stead; and, finally, that he voted by proxy during the proceedings of that meeting.

In support of the second ground, reliance was placed on his having consented to take shares only on the terms of being fully indemnified, and that the shares which he took were taken on the footing of their being fully paid up, and so entered on the register. As usual in cases where the shares are sought to be treated as fully paid, the case is rested on an agreement to have them so treated. It is not easy to see what the value in any case can be of an agreement which is supported by a false entry in the register, and which in effect defeats the right of the creditors against the shareholders, even to the limited extent of liability which the statute prescribes.

But in this case it is said that the shares were paid up, not by Admiral *Leeke*, but by moneys supplied for the purpose by

V.-C. S. 1871

LEEKE'S CASE

companies. It is said that for his services in the affairs of these companies it was agreed that a sum of £10,000 should be paid to Mr. *Lake*, and that out of this sum the amount of calls should be paid in repect of the fifty shares in the *Empire Corporation* allotted to Admiral *Leeke*. Accordingly, without any payment whatever having been made, the fifty shares of Admiral *Leeke* were entered on the register as fully paid up. The affidavit of Mr. *Lake* fully and clearly states how what he calls the formal payments were made as to these and other shares. "The cheques were in different sums, and bore different dates, and upon the distinct understanding that the proceeds of each cheque should be again paid into the company's bankers prior to another cheque being cashed, so as formally to make up the payments on the directors' shares."

Mr. *W. G. Lake*, the great actor and promoter in the affairs of these

It is by this juggle that Admiral *Leeke's* shares are asked to be treated as fully paid up. That there might be no ingredient wanting to complete the fictitious nature of the transaction, it was part of the agreement that Mr. *Lake* should assume the name of *George Bailey*, which was used on these cheques, and they were indorsed by him in that name.

It is impossible to treat these shares as having been paid up on such an arrangement as this. Indeed, I should have considered this case as involving no question of any difficulty or importance but for some authorities cited during the argument. These are authorities which sanction a notion that the limited right of a creditor to compel the shareholder to pay in money may be defeated or satisfied by an agreement among the shareholders to accept from each other something else than money in lieu of payment of the calls upon shares. If the question is upon the construction of the statute of 1862, there is nothing to countenance the notion of anything but money being a satisfaction of the limited liability. Indeed the money due in respect of calls upon shares is by the statute made a specialty debt. Great as the alteration of the law of contract is which the statute has made, the facility for fraud would be intolerable if by any agreement among themselves the creditor could be deprived even of his limited right, and of the absolute right to the limited amount of money capital. An agreement among the shareholders to contribute their capital, not in

money but in any commodity, with no criterion of value but the agreement of the shareholders, would make the subscribed capital a mere delusion.

If such an agreement was legal, the commodity, however worthless, might by agreement among the shareholders be taken as representing the whole or any amount of the capital which the Act of Parliament, in order to secure the creditor, at least to the limited amount, has made a specialty debt to an amount certain in money. The view of the invalidity as against creditors of such agreements seems to have been adopted by the Master of the Rolls in *Pell's Case* (1). He held that the person who claimed to have paid up his shares by an agreement to give something else in lieu of money was still a debtor, according to the statute, for the whole amount of his shares. What would seem to be the proper consequence of that view is a right in such a shareholder to be a creditor of the company for the value of that which he had given. The Master of the Rolls directed an inquiry as to the value of what was given. It does not seem to have been considered that there was any question whether the agreement, although it could not bind the creditor or release the shareholder from the obligation to pay the calls in full, did not entitle such a shareholder to prove as a creditor and come in with the other creditors for the full amount due in respect of these calls as an agreed price. If that be, as it would rather seem to be, the true view of the rights and liabilities, the inquiry as to value in the absence of any evidence of fraud or mistake would not have been necessary. If the inquiry was directed with the view of entitling the shareholder to set off the value against his debt for calls, it is not easy to adopt the notion of such a set-off. But the Court of Appeal took a view of that case which it is by no means easy to adopt till it has received further consideration. The Lord Justice *Giffard* reversed the decision of the Master of the Rolls. It would not become me to discuss the accuracy of the views stated by the Court of Appeal. But it was then held that the case was governed by *Drummond's Case* (2), in which the Master of the Rolls' decision was also overruled. This case is still more extraordinary, for it was there held, on appeal, not only that an agreement to

(1) Law Rep. 5 Ch. 11. (2) Law Rep. 4 Ch. 772.

V.-C. S. 1871 LEEKE'S CASE.

satisfy the debt for shares by something else than the money is valid, but that an agreement on one contract to take and pay for a certain number of shares can be satisfied by another contract with other parties to do something else, instead of paying what was due on the first contract. In the later case of *Forbes* and *Judd* (1), the Lord Chancellor made some observations on both these cases, and used this remarkable expression: "As to hardship to the creditors of the company, there is none, for they get the property instead of the money." That might be true, if the property was worth as much to the creditor as the money, or if the creditor agreed to take it instead of money. But all experience shews that the sort of property given in such cases is for the most part worthless, and often worse than worthless, because it involves liabilities greatly exceeding any real value. Indeed, the worthlessness of the property which is the subject of such agreements is the real reason why they are made.

The Act of Parliament is a statutory contract with the creditors. It limits the rights of creditors to a certain amount to be subscribed in money. If the creditors are no parties to an alteration of this contract, and if by an agreement among the shareholders, who are the debtors, without the consent of the creditors, they arrange to give property (where the thing deserves the name of property) for the capital instead of money, and the worth of the property is to be taken at the estimate of the debtor, without any agreement by the creditor, and this is to be forced on the creditor without giving him any right to inquire as to the value, there is no bound to the frauds which may be practised on creditors and honest shareholders.

Although these decisions seem to warrant a conclusion as to the validity of such agreements, I do not think they bind me to consider that the shares of Admiral *Leeke* can be considered as paid by such a juggle as was practised. Therefore the motion must be refused with costs.

Solicitors for Admiral *Leeke:* Messrs. *Sheppard & Riley.*
Solicitor for the Official Liquidator: Mr. *Pulbrook.*

(1) Law Rep. 5 Ch. 270–273.

In re IMPERIAL LAND COMPANY OF MARSEILLES. *Ex parte* JEAFFRESON.

V.-C. M. 1870 Nov. 5.

Company—Contributory—Reconstruction by forming a new Company—Payments to new Company—Liability to old Company.

The reconstruction of an insolvent company was attempted on the basis of the formation of a new company, to take over its assets and liabilities. The plan of reconstruction provided for the old company to be wound up and the shareholders to exchange their old shares, which were of £20 each, with £10 paid up, for half the number of fully paid-up shares of the new company of £10 each, and 6 per cent. debentures to an amount equal to the amount paid up upon their shares in the old company, credited with one half thereof as paid thereon, leaving the remaining half to be paid by instalments extending over a period of two years.

The shareholders were requested to assent to the proposal by signing a form of approval containing the terms of the plan, and the plan was carried out by resolutions passed at an extraordinary meeting of the company, duly confirmed at a subsequent meeting, and by a deed to which the liquidators of the old company and the two companies were parties:—

Held, that, as the creditors of the old company were not parties to the arrangement, a shareholder who had signed the circular, expressing his assent to the arrangement, and exchanged his shares, was not entitled to treat the instalments paid upon his debentures as being in reduction of his liability to the old company.

THIS was a summons adjourned into Court, that an order of the 14th of May, 1870, whereby Mr. *Jeaffreson* was required to pay £243 2*s.* 4*d.* to the liquidators of the *Imperial Land Company of Marseilles, Limited*, might be discharged, or that the execution thereof might be stayed, and that the liquidators of the company might be directed to treat the sixty-four shares of the applicant in the company as paid up to the extent of £896, and that no further call might be made thereon until it should be right and proper so to do, regard being had to such direction.

The case was selected as a representative one for a large class of the shareholders of the company.

The company was formed in January, 1866, and a memorandum and articles of association were duly registered. By the memorandum the capital was fixed at £1,600,000, divided into 80,000 shares of £20 each. Shortly after the formation of the company

V.-C. M. 1870 — *In re* Imperial Land Company of Marseilles. *Ex parte* Jeaffreson.

sixty-four shares were allotted to Mr. *Jeaffreson*, and he was duly registered as a shareholder.

Previously to 1866, Mr. *Jeaffreson* had paid all the calls on his shares made up to that time, amounting to £10 per share. On the 1st of March, 1867, the directors made a call of £1 10*s.* per share, payable on the 18th of March, 1867, and on the 27th of May, 1867, a further call of £1 per share, payable on the 10th of June, 1867. At the time of the latter call being made the company had become involved in serious pecuniary difficulties and discredit, and it was proposed to reconstruct the company by the formation of a new company to take over its assets and liabilities.

Accordingly, on the same 27th of May, 1867, before either of the calls had been paid by Mr. *Jeaffreson*, a circular was issued by the directors, and sent to all the shareholders, together with a copy of the plan of reconstruction, and a form to be filled up and returned to the directors approving of the plan of reconstruction.

This plan of reconstruction contained the following clauses :—

" 1. That a new company be formed and registered forthwith, to be called ' *The Consolidated Land Company of France, Limited,*' in shares of £10 each.

" 2. The new company to take over the whole of the properties and assets of the old company (subject to the various charges upon them), after provision shall be made for the payment or satisfaction of its liabilities.

" 3. Every shareholder in the old company to receive in exchange for the total amount paid on his shares such a number of shares in the new company of £10 each, fully paid up, as will represent one-half of the amount so paid by him, and for the remaining half of the amount so paid by him he will receive the debentures of the new company, payable ' to bearer,' and bearing interest at the rate of £6 per cent. per annum, payable half-yearly, and redeemable at par by the company, in five, and seven, and ten years, in equal proportions.

" 5. Shareholders who have not paid up their shares in full (in addition to their proportion of fully paid-up shares mentioned in clause 3), will receive debentures for an amount equal to the amount paid up on their shares in the existing company, and credited with one-half thereof as paid thereon, leaving the

remaining half to be paid by instalments extending over a period of two years.

"6. The £1 per share which is now to be paid up will be credited upon the debentures as a payment on account of the sum to be paid up by instalments as above mentioned.

"7. The remaining unpaid coupons for interest upon the existing shares, which became due in March, 1868, will also be credited as a further payment in respect of such instalments; but this privilege will only apply in the case of shares upon which £12 10*s.* per share, including the call of £1 per share now made, shall be paid."

Of the two remaining clauses, No. 4 related only to fully paid-up shareholders, and No. 8 related to the mode of issuing debentures.

Mr. *Jeaffreson* signed and returned to the directors the form, expressing his approval of the plan of reconstruction.

On the 22nd of August, 1867, an extraordinary general meeting of the company was held, at which four resolutions were passed. The first was, "That this meeting approves of the plan suggested by the directors in the secretary's circular letter to the shareholders of the 27th of May, 1867, for the reconstruction of the company;" the second, "That with a view to such reconstruction, this company be wound up voluntarily." The third resolution empowered the liquidators to concur in any arrangements for the construction of the new company, and to sell or transfer to them the goodwill and business of the old company; and the fourth resolution provided for dealing with dissentient shareholders. *Frederick Maynard* and *Octavius Ommanney*, were appointed liquidators, and the resolutions were confirmed at a meeting on the 5th of September, 1867.

The new company was incorporated on the 9th of September, 1867, with a capital of £1,600,000, divided into 160,000 shares of £10 each, and a memorandum and articles of association were registered, by which it was fully empowered to contract for the purchase of the goodwill and business of the old company, and to take all steps necessary for the purpose.

To complete the arrangement a deed was executed, dated the 23rd of September, 1867, and made between the liquidators of the

V.-C. M. 1870 *In re* Imperial Land Company of Marseilles. *Ex parte* Jeaffreson.

old company of the first part, the old company of the second part, and the new company of the third part, which, after reciting the resolutions and the plan of reconstruction, provided that the new company might intervene, take up, and carry on the business of the old company, undertake the execution of its contracts, and generally fulfil, satisfy, and discharge all or any of its engagements or liabilities for the benefit and, subject to the proviso thereinafter contained, at the risk, but not so as in anywise to increase the debts or liabilities of the old company, and should be entitled to the whole of the property and effects of the old company, but subject to the various charges upon such properties and assets, and after the provision for the discharge and satisfaction of all the debts of and liabilities of the old company. The proviso referred to gave the new company a right of set-off in certain cases. The seals of the two companies were affixed to the deed.

Mr. *Jeaffreson* exchanged his shares in the old company for the shares and debentures in the new company to which he was entitled under the arrangement; and at various times, between the 30th of October, 1867, and the 10th of April, 1869, paid instalments on the unpaid portion of the debentures, amounting in the whole to £256.

The new company carried on business for some time, and the liquidation of the old company was carried on *pari passu*, and its liabilities became considerably reduced, partly, as was alleged, by means of funds supplied by the new company; and in a balance-sheet appended to a report of the liquidators, dated the 20th of February, 1868, the latter were credited with a sum of £143,263 8*s.* 3*d.*, as paid in reduction of the liabilities of the old company.

On the 22nd of December, 1868, an order was made to continue the winding up of the old company under the supervision of the Court, two new liquidators being appointed, and Mr. *Ommanney* at the same time retiring. The new company was unsuccessful, and steps were taken for winding it up voluntarily; and on the 15th of November, 1869, an order was made to continue the winding-up under the supervision of the Court, and the matter was referred to the Chief Clerk, who was conducting the liquidation of the old company.

The liquidators in the old company made a further call of £1 per share, which, with the previous unpaid calls, and interest upon them, made up the amount of £243 2*s.* 4*d.* now claimed from Mr. *Jeaffreson.*

Mr. *Jeaffreson* sought to have the order discharged, on the ground that the instalments paid upon his debentures in the new company ought to be treated as having been paid in reduction of his liability to the old company.

Mr. *Pearson*, Q.C., and Mr. *Lindley*, in support of the summons:—

This is not a question whether a man can get rid of his liability to one company by taking shares in another company, but whether, when money has been paid to company *B* at the request of company *A*, on the faith that it was *pro tanto* a reduction of liability to company *A*, and the money so paid has been applied towards the liquidation of company *A*, the payment must not be treated as if it had been made direct to company *A*.

Money paid under the authority of the deed of the 23rd of September, 1867, to the new company, is money paid for the use of the old company. For this purpose the arrangement for reconstruction is binding upon all parties, for it was done with the full concurrence of the liquidators and both companies. It is immaterial whether the arrangement was *ultrà vires* or not, for it is not sought to treat the liability to the old company as discharged, except so far as money has been actually paid to be applied in reduction of their debts. For this purpose the seal of the company to the deed is a sufficient sanction of the arrangement. This is a voluntary liquidation, and the liquidators have sanctioned the arrangement by executing the deed, and their sanction is still binding, for the supervision order does not set aside the voluntary liquidation, but allows the liquidators to adopt any previous transactions. It is immaterial whether the money was paid to the liquidators or, for them, to any one else. We are, at all events, entitled to ask to have the payment of the call suspended till it is ascertained what proportion of the money paid to the new company was applied for the benefit of the old company: *In re Cork & Youghall Railway Company* (1).

(1) Law Rep. 4 Ch. 748.

V.-C. M. 1870 *In re* Imperial Land Company of Marseilles. *Ex parte* Jeaffreson.

Sir *Roundell Palmer*, Q.C., Mr. *Glasse*, Q.C., and Mr. *Higgins*, for the liquidators of the *Imperial Land Company*, and Mr. *Jackson*, for the creditors' representative, were not called upon.

Mr. *Crossley*, for some French creditors, was not allowed to be heard.

Sir R. Malins, V.C.:—

This is a somewhat complicated case, and I was for some time impressed with the arguments on behalf of Mr. *Jeaffreson;* but on consideration of all the facts and documents before me, I am obliged to decide against him.

The facts are shortly as follows: The company was formed early in 1866; and Mr. *Jeaffreson* took sixty-four shares, and paid up £10 per share, making altogether £640. The company being in difficulties, a circular was issued on the 27th of April, 1867, proposing a plan of reconstruction, which was, in fact, for the formation of a new company to take over the assets and liabilities of the old company. The benefit to be derived by the shareholders from this arrangement was, their being exonerated from the payment of the remaining £10 per share. If the plan had succeeded, there would have been an end of any claim against the shareholders as such. As regards Mr. *Jeaffreson*, his liability would have been changed from £640 upon his shares to £320 on debentures bearing interest at 6 per cent. This plan of reconstruction was carried out by formal resolutions passed at an extraordinary meeting of the company and duly confirmed, and ultimately, by a deed of the 23rd of September, 1867, formally carried into effect. It is agreed on both sides that this was the basis of the transaction, and that the position of those who adopted the arrangement was that of holders of fully paid-up shares and debentures partly paid up. Under these circumstances Mr. *Jeaffreson* might well be warranted in believing that payments which he made upon the debentures would *pro tanto* discharge the liability upon his shares in the old company; and if affairs had gone on well, there would have been eventually an end to his liability to the old company. I must, however, hold that he was bound to know that he could not discharge his liability as a shareholder in the old company by payments to the new company.

If all parties having an interest in the arrangement had assented to the plan of reconstruction, I should have held it binding, on the principle that payment to *A.* by the direction of *B.* is equivalent to payment to *B.* Then the question is, whether all interested parties did assent. The creditors were the persons most immediately interested, but they were no parties to the transaction, and never gave their authority to the payments to the new company. It follows, therefore, that if these calls are required for the payment of the creditors of the old company, they must be paid; for, as regards the creditors, Mr. *Jeaffreson* remained a shareholder liable for sixty-four shares, and he still remains equally liable. It is urged that, as the money can be provided by making calls upon the shareholders who have not paid instalments upon the debentures, those who have so paid ought not to be required to pay anything more till an equivalent amount has been paid by the others. But this question cannot arise till the creditors have been paid in full. In *Ex parte Oakes and Peek* (1), I adopted the rule that the creditors are the persons whose interests are first to be considered in a winding-up, and that the amount unpaid upon the shares is part of the assets of the company. This rule has received universal acknowledgment, being fully recognised and acted upon by the House of Lords when the same case went before them on appeal (2). But when the creditors are once paid, I am of opinion that the other shareholders will have to exonerate Mr. *Jeaffreson* from the additional liability which he has incurred by joining the new company, and he will ultimately be entitled to stand, as against the other shareholders, in the place of the creditors who may be paid off out of the present calls. I cannot go into any question as to how much of the present calls are required for the payments of the creditors. I consider myself bound to take the representation of the counsel for the liquidators and the creditors' representative that the money is required for the payment of debts, and must leave Mr. *Jeaffreson* liable to pay the full amount of the calls.

The result, therefore, is, that the summons must be dismissed so far as it requires the discharge of the order or restraint of execution; and so far as it requires the equities between the shareholders

(1) Law Rep. 3 Eq. 576. (2) Law Rep. 2 H. L. 325.

V.-C. M. 1870 *In re* Imperial Land Company of Marseilles. *Ex parte* Jeaffreson.

to be determined, it is unnecessary, inasmuch as that is always done. The summons will, therefore, be simply dismissed. As the case has been arranged to be taken as a representative one, the costs of all parties will be out of the estate.

Mr. *Crossley* has no right to appear, and cannot have any costs.

Solicitors for the Applicant: Messrs. *Nicholl, Burnett, & Newman.*

Solicitors for the Liquidators: Messrs. *G. S. & H. Brandon.*

Solicitors for the Creditors' Representative: Messrs. *Abrahams & Roffey.*

Solicitor for the French Creditors: Mr. *A. C. Ryan.*

V.-C. M. 1870 *Nov.* 8.

HOOD *v.* NORTH EASTERN RAILWAY COMPANY.

Railway Acts—Accommodation Works—Jurisdiction of Magistrates—Concurrent Jurisdiction in Equity.

Where, by an Act of Parliament, power is given to the justices of the county to direct such works to be constructed and maintained by a railway company as they may consider requisite for carrying out an efficient drainage of the adjoining land, the Court will refuse to exercise a concurrent jurisdiction as well after the completion of the railway as during its construction.

THIS case came on upon motion for decree.

The bill was filed by *Henry Hood,* of *Pepper Hall,* in *Yorkshire,* against the *North Eastern Railway Company,* praying that the Defendants might be restrained by injunction from causing or permitting the water intercepted by the works of the Defendants, and now running along the sides of the said railway and from the station and premises of the Defendants, from flowing through or over the adjoining lands and woods of the Plaintiff without proper channels or watercourses for carrying off the same; and from allowing or permitting the same water to flood or inundate the lands and woods of the Plaintiff; and the bill further prayed that the Defendants might be ordered to pay such damages as the Court should direct.

The railway was originally constructed by the *Great North of England Railway Company,* under an Act passed in 6 & 7 Will. 4,

and was opened for traffic in the year 1841. By several subsequent Acts the railway had become vested in the present Defendants.

In 1863 the Plaintiff became the purchaser from Lord *Alvanley* of the *Pepper Hall* estate, a portion of which had been taken by the railway company for the construction of their line.

The Plaintiff stated that, at the time of the construction of the railway, the system of drainage of the lands so purchased by him, adjacent to the line of railway, was ample and convenient. There was a watercourse of large dimensions on the western side of the present line of railway, running down in an easterly direction at right angles to the said railway, and such watercourse effectively carried off in one channel the superfluous water from a large tract of land, part of the *Pepper Hall* estate. The railway company, in the construction of their line, had intercepted the watercourse without making any adequate provision for drainage in lieu thereof, and the water was allowed to flow along the grips or ditches of the cutting on each side of the line of railway, and not in any regular channel or course. In consequence of this continuous and unchecked flow of water a slip had lately taken place in the soil of the embankment of the railway, and the fence there had fallen from its proper position, and the grips or ditches had become completely choked and blocked up, so that the water could no longer pass. The water thus intercepted and dammed back, and also the water from the railway drainage, was carried or allowed to flow over the Plaintiff's lands and woods adjacent to the line of railway without any effectual drain to carry it off. The drainage also from the lands adjoining the *Pepper Hall* estate was improperly diverted and caused to flow over parts of the said estate. Moreover, the bottom of the invert of a culvert constructed by the company was of such a height as to pen back the water, and to cause large accumulations of water, which were thrown over the Plaintiff's lands. The bill charged that the acts of the Defendants were in excess or in abuse of any statutory or other powers vested in them, and that great and irreparable injury would be done to the lands and woods of the Plaintiff unless the continuance of such acts were restrained by the order and injunction of this Court.

Before the arguments were opened on behalf of the Plaintiff, a

V.-C. M.
1870
HOOD
v.
NORTH EASTERN RAILWAY CO.

preliminary objection was taken by the Defendants, that the Court of Chancery was not the proper jurisdiction for deciding this case, and that the Plaintiff ought to have applied in the first instance to two justices of the district, as directed by the 76th and 81st sections of the Act 6 & 7 Will. 4, under which this railway was originally constructed (1).

(1) Sect. 76. "And be it further enacted, that the said company shall, at their own expense, after any part of the said railway shall have been laid out and formed, forthwith make and erect, and from time to time maintain, such and so many convenient gates in, upon, or adjoining the said railway, and such and so many bridges, arches, hollows, slopes, culverts, fences, ditches, drains, and passages, over, under, or by the side of or leading to or from the said railway, of such dimensions and in such manner as two or more justices of the peace, acting within their jurisdiction, shall, upon the application of the owner or occupier of any lands, judge necessary and appoint (in case there shall be any dispute about the same). And all such gates, bridges, arches, hollows, slopes, culverts, fences, ditches, drains, and passages so to be made as aforesaid shall from time to time, and at all times thereafter, be maintained in sufficient repair and condition by the said company. And in case the said company shall neglect or refuse to make or erect or to maintain such gates, bridges, arches, hollows, slopes, culverts, fences, ditches, drains, and passages as hereinbefore directed, or any of them, for the space of ten days next after the time to be appointed for those purposes respectively by such justices, it shall be lawful for the respective owners or occupiers of the said lands who shall find themselves aggrieved by such neglect or refusal to make and erect or (as the case may require) to maintain and repair such gates, bridges, arches, slopes, hollows, culverts, fences, ditches, drains, and passages as the said justices shall have before directed or appointed to be made and erected as aforesaid, so that in making, erecting, repairing, or maintaining such gates, bridges, arches, hollows, slopes, culverts, fences, ditches, drains, and passages as aforesaid, the said railway, or any of the works by this Act authorized to be made or constructed by the said company, shall not be obstructed for any longer space of time or be injured in any other manner than shall be unavoidably necessary. The costs to be paid by the company, as therein mentioned."

Sect. 81. "And be it further enacted, that the company shall, and they are hereby required from time to time, at their own expense, to make such arches, tunnels, culverts, drains, or other passages, over, under, or by the side of the said railway, and the fences on the sides thereof respectively, of such breadth, depth, and dimensions as shall be sufficient at all times to convey the water as clearly from the lands adjoining or lying near to the said railway as before making the said railway, without obstructing or impounding the same water to the prejudice of any of the said lands, and also to make proper watering-places for cattle in all cases where, by means of the said railway, the cattle of any person occupying lands adjacent thereto shall be deprived of access to their ancient watering-place, and to supply the same at all times with water from such rivers, brooks,

The VICE-CHANCELLOR desired that the question of jurisdiction should be argued first.

Mr. *Pearson*, Q.C., and Mr. *Jones-Bateman*, for the Plaintiff:—

By this railway act power is given to two justices to decide what accommodation works shall be constructed for the convenience of the landowners upon the line of railway, but the Act is permissive only; and it is in the discretion of the justices whether they will entertain these complaints or not. A landowner is not compelled to select the justices as the tribunal for the decision of such questions. The intention of the Legislature evidently was to provide a convenient tribunal for obtaining a speedy decision upon any questions of trifling importance which might arise during the construction of the works of the railway, but it never could have been intended that a question of serious damage, such as the Plaintiff now raises,

---

streams or springs of water as would have supplied the cattle of such person if the said railway had not been made, or from any other source or feeder which can lawfully be obtained for that purpose; and it shall be lawful for the said company, and they are hereby required, from time to time to make such and so many watercourses and drains by the side of, and along, or under the said railway, or in, through, over, and across any lands thereto adjoining, of such dimensions and in such manner and with such proper and convenient bridges over and tunnels under the same respectively as any two or more justices of the peace, acting within their jurisdiction, shall from time to time judge necessary and appoint, in case there shall be any dispute about the same, for the purpose of conveying water to the said watering-places respectively, and all such arches, tunnels, culverts, watercourses, drains, and other passages shall from time to time be supported, maintained, cleansed, and kept in good and sufficient repair by the said company; and if at any time after ten days' notice in writing shall be given by or on behalf of any owner or occupier of land adjoining or lying near to the said railway, to the said company, that the said tunnels, arches, culverts, drains watercourses, or other passages, or any of them, are not made or being made, are not cleansed, maintained, and repaired according to the true intent and meaning of this Act, the said company shall not proceed to make or cleanse, maintain and repair (as the case may be), such arches, tunnels, culverts, drains, watercourses, or other passages, it shall be lawful for any person to apply for an order in writing to any two or more justices of the peace, acting within their jurisdiction, from time to time, as often as there shall be occasion; and the said justices are hereby empowered at their discretion to make and grant such order as aforesaid, enabling such person to make or cleanse and repair such arches, tunnels, culverts, watercourses, drains, and other passages accordingly; and the reasonable expenses thereof (to be ascertained by such justices) shall be defrayed by the said company, to be recoverable by distress, as therein mentioned."

V.-C. M. 1870 HOOD v. NORTH EASTERN RAILWAY CO.

should be decided by the justices of the county. The justices would have no power to compel the company to effect such alterations as the Plaintiff requires by his bill, nor could they give full relief by awarding damages according to the prayer of the bill. The 76th section of the Act applies distinctly to accommodation works required by the landowners before the completion of the railway; and the 81st section has reference only to the construction of water accommodation for cattle; and it is enacted that, if the required works are not effected, any person may apply for an order to do the works himself. This does not apply to the reconstruction of culverts and drains under the railway of the serious nature now rendered necessary.

That this Court is the proper tribunal for the present application, is established by the various cases which have been decided; but, under any circumstances, there is a concurrent jurisdiction, and the Plaintiff has a right to choose his own tribunal, and to come to this Court if he thinks it best calculated to remedy the evil complained of. And this he may do, notwithstanding the time which has elapsed since the completion of the railway.

In *Attorney-General* v. *Leeds Corporation* (1) the Court interfered, at the suit of a landowner, to restrain the pollution of a river, which was contrary to the provisions of an Act of Parliament, although the sewer had been completed and in operation sixteen years before proceedings were taken; and in *Hood* v. *North Eastern Railway Company* (2) the provisions of an Act of Parliament, requiring a railway company to use a particular station as a first-class station for the stoppage of all ordinary trains, were enforced, though the railway was completed in 1842, and the bill was not filed till 1869; and in *Gordon* v. *Cheltenham and Great Western Railway Company* (3) it was laid down that acquiescence would not deprive a landowner of his remedy. The sections of this Act require the justices to act by way of arbitrators to decide upon the method of carrying out the drainage and other works, but here the bill seeks an entire alteration in the construction of the works, which the magistrates would have no power to order. It may be that in making the necessary alteration the railway will

(1) Law Rep. 5 Ch. 583. (2) Law Rep. 5 Ch. 525.
(3) 2 Railw. Cas. 800.

for a time be stopped; but in *Raphael* v. *Thames Valley Railway Company* (1) it was decided that a railway company could not set up the inconvenience to the public, by the interference with the traffic, as a reason for not performing an agreement.

This Court cannot refuse to interfere when it is shewn that the company has exceeded its powers: *River Dun Navigation Company* v. *North Midland Railway Company* (2); and in *Agar* v. *Regent's Canal Company* (3), Lord *Eldon* said the companies must be kept within the powers which the Acts gave them. In *Hodges* on Railway Companies (4) it is laid down that this Court will interfere where roads, bridges, stations, or other works are constructed contrary to the provisions contained in an Act of Parliament, and where works are without authority constructed which have a direct tendency to injure the adjoining lands.

Attorney-General v. *West Hartlepool Improvement Commissioners* (5) is a case in which Vice-Chancellor *James* expressed a strong opinion respecting the propriety of applying to the Court, and of the Court retaining a jurisdiction which it could quite as well exercise as the Court of Quarter Sessions.

It further appears from the evidence that the Plaintiff offered to refer the subject of his complaint to two engineers, and proposed that his engineer should meet the company's engineer, that they might ascertain what alteration could be effected in the drainage to remedy the complaint; but this proposal was not acceded to by the company, who therefore rendered it necessary for the Plaintiff to file the present bill.

Mr. *Bristowe*, Q.C., and Mr. *Williamson*, for the railway company:—

When the Legislature has provided an efficient tribunal for the decision of particular grievances it is not the habit of this Court to interfere with such enactments, and to take upon itself the duties which can be better and more cheaply performed by the proper authorities. We do not say that this Court has no jurisdiction, but we submit that the proper tribunal is that of the

(1) Law Rep. 2 Ch. 147.
(2) 1 Railw. Cas. 135.
(3) Coop. G. 77.
(4) Page 6.
(5) Law Rep. 10 Eq. 152.

V.-C. M. 1870 HOOD v. NORTH EASTERN RAILWAY CO.

justices in petty sessions for the trial of all such questions as may arise between landowners and railway companies in the construction of railway works. We also submit that this is not a case in which the Court would be justified in interfering, even if it had a concurrent jurisdiction, since it would be extremely difficult, if not impossible, for a Judge in Equity to decide without actual inspection of the locality, or without the expensive process of sending experienced engineers to report upon the subject, what would be the proper remedy, suppose any remedy is required, while the magistrates residing on the spot may ascertain the merits of the case and the justice of the complaint without any inconvenience; that the proper tribunal pointed out by the Act of Parliament is the petty sessions it is impossible to doubt. The two sections referred to must be read together, and there is no question but that the Act directs the justices to order what works shall be constructed, both during the formation of the railway and after its completion, for the purpose of effecting proper drainage and other necessary accommodation works required by landowners.

In this case the railway has actually been open to the public for twenty-nine years, and the works complained of are in the same state as they always have been. There is no greater quantity of water now upon the Plaintiff's land than there has been during the whole of this period, and no complaint was made by the Plaintiff's predecessor regarding the efficiency of the drainage. If Mr. *Hood's* complaint is one which would involve an extensive alteration of works which have always existed, then he is too late in coming to this Court, as a serious injury would be caused to the railway. But if the complaint involves no more than the lowering of a drain, which might be effected without detriment to the works of the railway, then he can obtain such redress as he may be entitled to by an application to the justices.

There is no reported case in which such an application has ever been granted by this Court; but, on the contrary, similar applications have always been refused. Mr. *Kerr*, in his book upon Injunctions, well expresses it when he says (1): "The question for the Court to consider, when its interposition is sought in cases where a remedy may be had in the courts of ordinary jurisdiction,

(1) Page 6.

is, whether the remedy there given is sufficient and adequate for the purpose of justice." In this case the powers given to the justices are quite sufficient and adequate for the purpose of doing justice between the parties, and the Court will not interfere when there is a tribunal appointed by the Legislature competent to decide the matter at issue. In *Martin* v. *Powning* (1) the Court declined to interfere in a case before the Court of Bankruptcy, on the ground that that Court had sufficient power to enable it to deal with the question; and in *Stone* v. *Thomas* (2) it was decided that, although there was a concurrent jurisdiction in Chancery, it was not expedient to interfere with the Court of Bankruptcy, which had complete jurisdiction to decide the question. So also in *Berkeley* v. *Dicker*, before your Honour on the 31st of May, 1867, your Honour came to the conclusion not to interfere with the jurisdiction of the Bankruptcy Court

Therefore, it is clearly established that, where there is another tribunal sufficient and adequate to administer justice, this Court will refuse to exercise a concurrent jurisdiction. Under any circumstances, the Plaintiff should have made his application in the first instance to the justices, where, at a trifling expense, he might have had his complaint heard, before going to the serious expense of instituting a suit in Chancery.

Mr. *Pearson*, in reply.

SIR R. MALINS, V.C.:—

The Plaintiff purchased this estate, called the *Pepper Hall* estate, from Lord *Alvanley* in 1863. Through that estate the railway runs, and was constructed, completed, and opened for public traffic in the year 1841, being twenty-eight years before this bill was filed. It was the duty of the railway company, when they constructed their works, to make proper culverts, bridges, and accommodation works of every kind, and the obligation is strongly thrown on the company by this particular Act of Parliament, which was passed in 1839, long before those general Acts of 8 Vict., the *Lands Clauses Act*, the *Railway Clauses Act*, and so forth, which are now so frequently referred to. These obligations, by the

(1) Law Rep. 4 Ch. 356. (2) Law Rep. 5 Ch. 219.

V.-C. M. 1870 HOOD v. NORTH EASTERN RAILWAY CO.

76th, 77th, and the following sections, are specified in language as distinct as it is in any of the general Acts, and probably even more so, and the usual power is given to landowners, if they are dissatisfied as to any of the accommodation works, whether they are gates, culverts, bridges, or anything whatever coming under the denomination of accommodation works, to apply to two justices, who can decide what those works should be, and who have complete power of making such orders on the railway company as would oblige them to construct the necessary and proper accommodation works.

This railway having been completed in 1841, was then opened for public traffic, and I must assume that the works were done to the satisfaction of the then owner of the *Pepper Hall* estate, Lord *Alvanley*, and were constructed in a proper manner. No serious complaint seems to have been made, and no steps were ever taken, and no bill in Chancery was filed. It has not even been suggested that any application to the justices was ever made, or that in any distinct shape whatever any disapprobation or dissatisfaction at the mode of constructing this railway was ever expressed. The Plaintiff acquired his title in the year 1863; consequently, twenty-two years before he became entitled to the *Pepper Hall* estate, this railway had been constructed, and I must assume that proper culverts and proper drains were made, and that everything was in a satisfactory state of completeness. This gentleman, however, now complains, and I assume, for the purpose of my decision (and that has been the basis of the argument I have heard), that he has some ground of complaint.

The question I have now to decide is, whether, under these circumstances, the matter should be gone into before me. The substance of the Plaintiff's case is stated to be that, there being a culvert at the point indicated in the plan which ought to be so low as to carry off all the water which is collected at a particular point, is, in fact, so constructed that it is about ten or twelve inches too high at the bottom, that the water is there accumulated, and instead of being carried away by this culvert it runs off and inundates the Plaintiff's land, and that he has great complaints from his tenant, who says that he cannot continue to occupy the land unless that state of things is altered. Assuming that to be the

case, if there is a defect now, there was a defect twenty-eight years ago. I have heard no reason assigned why there should be more water now then there was when the railway was made. There has been no brook brought there and no source of water drained there that I have heard of; and if it is the surface water arising from the natural drainage of the country, that may be caused by the rains, in which, taking one year with another, there is very little variation. I cannot therefore assume that there is any greater quantity of water there now than there has been on the average of the twenty-nine years during which the railway has been opened.

The point I have to decide is, whether this is a question for the interference of the Court of Chancery? If it is a proper case for this Court, it would not depend on the greater or lesser injury arising from the defective state of the culvert or drain, but I should be obliged to lay down the rule and act upon it, as far as I am concerned, that wherever, in consequence of a defective drain or a culvert being made too small or too large, or whatever it may be, injury is caused, however small, provided it amounts to the extent which gives a right to maintain a suit in Chancery, namely, £10, this Court is to be the tribunal in which all such questions are to be decided. Anything more unjust, more detrimental, in my opinion, to the interests of the persons complaining could hardly be. The Legislature has foreseen that such complaints would exist, and it has foreseen that there might be questions between the parties as to what were the proper drains, culverts, bridges, and so forth—all the accommodation works enumerated in the particular public Acts—and seeing, therefore, that it would be exceedingly difficult for any of the great tribunals of this country to decide them, and knowing that such disputes could be easily decided by persons of competent knowledge, ability, and fairness, it has committed the decision of all such questions to the justices of the district sitting in petty sessions. Applying that rule to this case as a rule of convenience, and assuming that this gentleman has some ground of complaint, why could he not have brought it before the neighbouring justices? Does he so distrust his neighbours that he cannot leave it to them to look at this place and say whether there is sufficient drainage for him? I entertain no doubt that it is the intention of the Legislature in this

V.-C. M. 1870 HOOD v. NORTH EASTERN RAILWAY CO.

particular Act of Parliament, afterwards embodied in the General Acts of 8 Vict., in all these questions of accommodation works, whether in the construction of the line originally or in the continuance of the works, that all such questions should be referred to the immediate and neighbouring tribunal, namely, two justices, who probably would inspect the place and decide what should be done.

It is said that this Act does not apply to the present case. I think the Defendant's counsel is possibly right in saying that the 76th section and the 81st section must be taken together. The 76th section provides, "That the company shall, at their own expense, after any part of the railway shall have been laid out and formed, forthwith make and erect, and from time to time maintain, such and so many convenient gates in, upon, or adjoining the said railway, and such and so many bridges, culverts, drains, &c., over, under, or by the side of, or leading to or from the said railway, of such dimensions and in such manner as two or more justices of the peace, acting within their jurisdiction, shall, upon the application of the owner or occupier of any lands, judge necessary and appoint." Then it goes on to decide what shall be done in the case of any dispute. Therefore all the accommodation works are to be prescribed by the justices if the parties differ. Then the 81st section, upon which the question immediately turns, provides, "That the said company shall from time to time, at their own expense, make such arches, tunnels, culverts, drains, &c., of such dimensions as shall be sufficient at all times to convey the water from the lands adjoining without obstructing or impounding the water to the prejudice of any of the said lands, and also make proper watering-places for cattle" in the particular cases pointed out.

Now, supposing this question had arisen as to the sufficiency of these arches, tunnels, culverts, and drains during the construction of the works, I am clearly of opinion that this Court would not have been the proper tribunal to decide that question, but they must have applied to the justices under the 76th and 81st sections. I believe there are no cases reported, except those of *Coates* v. *Clarence Railway Company* (1) and *Manser* v. *Eastern Counties Railway Company* (2), exactly bearing upon the point. In the course of my experience I have not known of any case in which

(1) 1 Russ. & My. 181 (2) 2 Railw. Cas. 380.

this Court has interfered upon the application of a landowner as to accommodation works to be provided for him in the construction of the railway. This Court always has interfered, and always will interfere, where railway companies, in constructing their lines, go beyond their Parliamentary powers. If they do not construct a road with a proper gradient, or otherwise, according to their positive contract, or according to the requisitions of the Act, then wherever there is an excess of the Parliamentary powers this Court will interfere to keep the railway company within those powers. But when it is merely a question of accommodation works, I apprehend it is not the practice of this Court, and never has been, to interfere in those trivial matters, but they are left to be decided, as the Act requires they should be decided, by the neighbouring justices. The case of *Coates* v. *Clarence Railway Company* (1) is a remarkable instance, but it has been shewn that it does not apply to this case. That arose during the construction of the railway, and the act there being done by the company was a very wanton act; besides which, whilst they could do what they needed without injuring the Plaintiff, they were doing it in such a manner as to inflict injury upon him. This Court, in the exercise of the jurisdiction inherent in it, made the railway company construct their works in such a manner as not to injure the Plaintiff. That arose during the construction of the works, but it has nothing whatever to do with a question arising between the company and a landowner many years after the works have been constructed. If I am right in saying that the Court would not have interfered during the progress of the works, then these works are to be maintained so as to be sufficient at all times to carry off the water. The Act provides, "That it shall be lawful for the said company, and they are hereby required from time to time, to make such and so many watercourses and drains by the side of and along or under the said railway, or in, through, over, and across any lands thereto adjoining, of such dimensions, and in such manner, and with such proper and convenient bridges over and tunnels under the same respectively, as any two or more justices of the peace, acting within their jurisdiction, shall from time to time judge necessary." It is said this refers to water accommodation for

(1) 1 Russ. & My. 181.

V.-C. M. 1870 HOOD v. NORTH EASTERN RAILWAY CO.

cattle. I do not read it so. The first part of the section is, that they are to make all these proper works. They are to maintain them at all times, and they are to make such as the justices shall prescribe. It appears to me that, according to the Act of Parliament, the application to the justices is a condition precedent to any right whatever. They are to prescribe what is to be done. If there should be any difference of opinion during the progress of the works, the justices shall decide; and, in my opinion, they must decide, if any dispute arise after the works have been constructed, and so long as they shall continue to exist. "And in case there shall be any dispute about the same for the purpose of conveying water to the said watering-places respectively." I do not read those words as restricting the generality of the enactment, but I hold that, in accordance with what has gone before, the works to be made and maintained are such as are to be prescribed by the justices. It then proceeds:—[His Honour then read the remainder of the 81st section.] Nothing, therefore, can be more extensive than the powers of the justices. They have an absolute, uncontrolled discretion to prescribe what works are to be made, and the company are required to do what they prescribe. It may be that a mandamus would lie against the company to compel them to do it. But, at all events, if the company do not do it, then the justices, having taken such opinions as they think proper, may give the landowner himself the power of doing it, and the power of recovering the expenses if not paid within ten days. He can recover those expenses, not by an action, but by distress, as if for rent due. These powers being so extensive, upon what principle it was that this gentleman, before he instituted this Chancery suit, did not call those powers into action I do not understand; because the justices then could have done that which it is impossible for me to do, and without which I am perfectly satisfied no man will ever thoroughly understand the merits of the case, namely, go and look at the place, and see what is the extent of damage, and what is the proper remedy to be applied. I have no doubt whatever that if he had taken that course, at a twentieth part of the expense which has now been incurred, the whole thing might have been set right. Therefore I think it highly inexpedient that this Court should hold out encouragement to every

vexatious and litigious landowner who has a trifling evil of this kind to complain of, and who, instead of going to the tribunal pointed out by the Legislature, should harass his opponents by a Chancery suit to do that which would be done much better by the justices, and which this Court cannot satisfactorily do. If I were to hear the whole evidence in the case, the result would probably be that I should be unable to arrive at any conclusion, and I should probably put it to the parties whether they would agree to appoint some engineer to state what ought to be done. Or if I adopted the other course, and said something ought to be done, and that there should be damages, I should have to refer it to Chambers, for my Chief Clerk to ascertain what damages should be paid. There would be a warfare of affidavits upon that, and he would probably find a sum, and I should be asked to find another; and if I differed from him it would very likely go to the Lord Chancellor or the Lords Justices, who would find something different from either; and then it might go to the House of Lords, who would find something different from either the Chief Clerk or myself or the Court of Appeal. My strong impression is, that this Court has no jurisdiction; but whether I have jurisdiction or not I am perfectly satisfied it is a jurisdiction, if I have it, which I should be most slow to exercise, and that no encouragement ought to be held out to litigants of this class to come to this Court in matters so insignificant, and which, I repeat, can be so much better and more speedily decided elsewhere.

With regard to the principle applicable to the case, I have had occasion myself to consider it in two cases, that of *Berkeley* v. *Dicker* and *Brown* v. *Brown* (1), where I was asked to restrain proceedings before other tribunals. I did not question that in both cases I had jurisdiction, but I was perfectly satisfied that it would be most inexpedient for me to exercise it. With regard to the cases before the Lord Chancellor and the Lords Justices of *Martin* v. *Powning* (2) and *Stone* v. *Thomas* (3), I think they are entirely applicable here. Those were questions which arose upon the administration of the trusts of deeds executed under the *Bankruptcy Act*. It was decided that this Court has jurisdiction

(1) Law Rep. 7 Eq. 185. (2) Law Rep. 4 Ch. 356.
(3) Law Rep. 5 Ch. 219.

V.-C. M. 1870 HOOD v. NORTH EASTERN RAILWAY CO.

wherever there is a trust created to carry it into execution, and to do whatever is necessary under that trust. But there, there was a jurisdiction in Chancery, and the Vice-Chancellor *Stuart*, upon the principle of there being a concurrent jurisdiction, entertained the bills in those cases; at least he did so in one, and declined to decide the other, because the contrary had been decided by the Court of Appeal in *Martin* v. *Powning* (1). In both those cases, the Lord Chancellor in one, and the Lords Justices in the other, decided that, although there was concurrent jurisdiction, it was inexpedient that it should be exercised, because there was a complete and much better jurisdiction, and that it was right to go to that which was the proper jurisdiction for the purpose. Upon the same principle, if I have jurisdiction—which I am strongly impressed I have not, for it appears to me that, upon the proper construction of the Act, the order of the justices is a condition precedent to any order whatever—I am perfectly clear it is one I ought not to exercise, and that every discouragement ought to be placed in the way of such questions as this being brought before the Court. I acted on the same principle in a case of *Dawes* v. *Rowland*, where the bill was filed to restrain the continuation of a trespass. I did not entertain any doubt there that I had jurisdiction, but I was very clearly of opinion that it was a case in which I ought not to exercise it, because the case was very insignificant, and because, at a twentieth part of the expense, the whole question between the parties might have been decided by an action of trespass in the adjoining County Court. On that ground I dismissed the bill with costs. I am very glad that there was an appeal from my decision, which was confirmed; the result was that the appeal was dismissed with costs. I think that decision is not without importance in the present case.

Looking, therefore, at every view I am capable of taking, having regard to all the authorities which have been cited, most of which are cases with regard to breaches of positive contract by public companies, or their going beyond their Parliamentary powers, in each of which cases this Court always interferes, it appears to me, on all these grounds, my duty is to come to the conclusion that this is a case in which the bill ought not to have been filed, that it

(1) Law Rep. 4 Ch. 356.

is not a proper case to bring before this Court, and therefore that the bill must be dismissed.

Then comes the question of costs. Upon that I feel considerable difficulty. This bill ought not to have been filed, and therefore it appears to me that it ought to be dismissed with costs, up to a certain time; but I am by no means satisfied that the Plaintiff ought to pay the costs of the evidence, because I think it was a proper case to have been heard at once by demurrer upon the question of jurisdiction, which would have saved the expense of evidence. Then, after that time I am not satisfied with the conduct of the railway company in preventing a meeting of both engineers, which was proposed by the Plaintiff, who might probably have come to some arrangement for effecting the works required by the Plaintiff. Therefore, under all the circumstances, I come to the conclusion that the bill should be dismissed without costs.

Solicitor for the Plaintiff: Mr. *Darley*.
Solicitors for the Defendants: Messrs. *Williamson, Hill, & Co.*

In re MERCANTILE TRADING COMPANY.

SCHRODER'S CASE.

Shares in a Company—Payment by Confederate Bonds—Power of Directors to receive Money's Worth.

Upon an adjourned summons to place the name of a holder of shares on the list of contributories of a company formed for running the blockade of the *Confederate States*, it appeared that the managing director had agreed to accept Confederate or cotton bonds in payment of the amount due for the shares, and that the shareholder was credited with the amount in the company's ledger, and his shares entered as fully paid up. A letter was subsequently written by the managing director to the shareholder, intimating that payment in bonds would be taken from subscribers for increased capital for only so much as they produced in money. The bonds, at the time they were accepted, were saleable at the price at which they were received in payment, but became afterwards worthless:—

Held, that the directors had power to receive money's worth in payment of shares; that the Confederate bonds having been accepted as payment, and the shareholder credited with the amount, and the shares entered as fully

V.-C. M.
1870
SCHRODER'S CASE.

paid up, he could not now be placed on the list of contributories, and that the letter of the director having been written after the agreement was part performed did not invalidate the original transaction.

THIS was an adjourned summons upon the application of Baron *Schroder* that his name might be removed from the list of contributories in respect of five shares in the *Mercantile Trading Company, Limited.*

The company was registered under the *Companies Act*, 1862, on the 27th of June, 1863. The objects of the company, as stated in the memorandum of association, were the purchase of goods and ships for export and transmission to *America* for sale or barter and return and sale of goods from thence, and the chartering or freighting of ships, and all other matters necessary for carrying on the operations of the company.

The real object for which the company was formed was for sending out ships to run the blockade of the *Confederate States*, the ships being freighted with merchandise required by the Confederates, and bringing home cotton for sale in this country. Various circumstances connected with the operations of the company during the short period of its existence will be found in a previous report: *Stringer's Case* (1).

The capital of the company was to consist of 150 shares of £1000 each, of which 112 shares were taken and all entered as fully paid up. Among the persons entered as shareholders was Baron *Schroder*, whose name appeared as the holder of five shares; but it was stated that he took them, as agent, for Mr. *Moffatt*, who admitted his liability in respect of them.

It was in evidence that Mr. *Moffatt* entered into an arrangement with Mr. *Stringer*, the managing director of the company, that he should pay for the five shares in the following manner: that is to say, that he should pay £500 in cash, and should give five Confederate bonds (or cotton bonds, as they were called), at the price of issue, for the remainder of the amount. These bonds, which were issued by the Confederate Government, payable either in money or in cotton at a uniform price of 6*d.* per pound, were issued at £90 per cent., or £900 for each bond, and it was alleged by Baron *Schroder*, and not denied by the official liquidator, that

(1) Law Rep. 4 Ch. 475.

they were saleable at that price at the time they were received in payment for the five shares. Accordingly, on the 2nd of July, 1863, Mr. *Moffatt* paid, through Baron *Schroder*, a cheque for £500, which was duly cashed, and five Confederate bonds valued at £4500, making up the remainder of the sum due for the purchase of the five shares in this company.

It appeared by the ledger of the company that the transaction was entered in this form: On one side Baron *Schroder* was debited with £5000, and on the other side he was credited with £500 cash on the 2nd of July, and Confederate bonds £5000, taken at £90 per cent., £4500, as in August, by which the account was balanced, and the shares were entered in the share register-book of the company as fully paid up.

The summons was opposed by the official liquidator and by the *Agra and Masterman's Bank*, who were the principal creditors of the company, on the ground that the directors had no power to receive the Confederate bonds in payment of the money due from Mr. *Moffatt*, and that they must be taken to have been accepted as security only for so much as they actually produced. The bonds had not been parted with, and were now worthless, and consequently it was contended that a sum of £4500 was still due from Mr. *Moffatt*, or from Baron *Schroder* as his agent; and the principal evidence relied upon was a letter written by Mr. *Stringer*, the managing director, or by his clerk in his name, to Baron *Schroder*, and dated the 28th of July, 1863, to the following effect: "To avoid misunderstanding, please have it impressed upon the mind of the gentlemen who subscribe to our increased capital in Confederate bonds that our company does not become the purchaser or owner of the bonds so subscribed, but merely takes them and raises the money on them for their account, giving them an interest in the stock of our company to the amount so raised."

Baron *Schroder* was cross-examined *viva voce* upon his evidence given in the cause.

Mr. *Pearson*, Q.C., and Mr. *Marten*, for Baron *Schroder*:—

There is no dispute about the facts in this case. All the principal facts are admitted; and the only question is, whether the Confederate bonds were properly received by the directors of the

V.-C. M. 1870

SCHRODER'S CASE.

company in payment of the money due upon the shares. It is not disputed that Baron *Schroder* paid the five bonds as agent for Mr. *Moffatt*, or that Mr. *Stringer*, the managing director, agreed to accept the bonds. There is no evidence to shew that the bonds were not worth 90 per cent., the price at which they were taken, and for that sum they might have been sold in the *London* market. It was, in fact, a payment of money or money's worth; and it was settled in *Drummond's Case* (1), in *Pell's Case* (2), and in other cases, that a man who agrees to take shares in a company is not bound to pay for them in money, but may, with the consent of the directors, pay in money's worth. This law was referred to in *In re Baglan Hall Colliery Company* (3), where this Court said it was equally clear that the delivery of goods or money's worth, which is to relieve from the payment of money, must be something given to the company in lieu of the money after it is formed, but that that which is given to the company before its formation will not do. It was only upon the last portion of this opinion, as to giving money's worth before the formation of the company, that the Lords Justices disagreed with the decision of this Court. It is proved by the acts of the company themselves, and by the ledger and share books, where the shares are entered as fully paid up, that these bonds were received as actual payment for the shares, and evidence is admissible to shew the nature of the consideration: *Leifchild's Case* (4). The letter written by Mr. *Stringer*, or by his clerk, cannot alter the effect of a distinct agreement partly carried into effect before the letter was written, and must therefore be taken to refer to any subsequent transactions of a similar nature. Under any circumstances, it is wrong to place Baron *Schroder's* name on the list of contributories, since his shares are entered as paid-up shares, and any subsequent claim must be enforced against him as a debtor to the company, and not as a shareholder: *In re Marlborough Club Company* (5). The official liquidator has no right to put a shareholder fully paid up upon the list merely for the purpose of asking him all sorts of questions having no reference to the claim, as he has done in this case.

(1) Law Rep. 4 Ch. 772.
(2) Ibid. 5 Ch. 11.
(3) Law Rep. 5 Ch. 352; Vice-Chancellor *Malins'* judgment in note.
(4) Law Rep. 1 Eq. 231.
(5) Law Rep. 5 Eq. 365.

11 Jur. N.S. 940

Mr. *Cotton*, Q.C., and Mr. *Higgins*, for the official liquidator:—

Our contention is, that these shares never were fully paid-up shares, and that they were not treated as cash shares. Assuming that the bonds were taken by Mr. *Stringer* in payment of the shares, then we say it was *ultrà vires*, and that there is nothing in the Act of Parliament under which this company was formed, nor in the Act of 1862, which could give the directors power to receive Confederate bonds in lieu of cash. The question now is between the creditors and contributories, and the onus is upon Baron *Schroder* to prove that he paid for the shares. This company was in fact a partner of the Confederate Government. They provided ships to supply the government with goods and to bring away the cotton which was stored ready for them. No company could be justified in receiving securities of such a doubtful character as these bonds were without the sanction of the shareholders; and the cases of the *Baglan Hall Colliery Company* (1) and *Pell's Case* (2), and those of a similar description, do not apply, since those were cases in which the company received goods that they might fairly and legitimately deal in. It is for the official liquidator to see that the money said to have been paid is accounted for, and he is under any circumstances entitled to an inquiry how much money was paid. The bonds are now almost worthless, and it is for Baron *Schroder* to prove that the money is forthcoming; and if he cannot do so, then he is a contributory for five shares upon which only £500 has been paid, as in *Migotti's Case* (3). Whatever the bonds might sell for now, Baron *Schroder* would be entitled to set off against the money he ought to have paid, as was done in *Pell's Case*. We contend that the shares never were paid for in any competent manner.

But, suppose it should be held that the directors were justified in receiving these Confederate bonds, then we contend that they were only taken on the footing of the letter written by Mr. *Stringer* in July, 1863. They were, in fact, received for so much as they might produce. The letter of July is a complete answer to the contention on the part of Baron *Schroder*, as it is there expressly stated that the company does not become the purchaser or owner of the bonds, but merely takes them and raises money on them for the

(1) Law Rep. 5 Ch. 352. (2) Law Rep. 5 Ch. 11.
(3) Law Rep. 4 Eq. 238.

V.-C. M. 1870 SCHRODER'S CASE.

account of the depositor, giving him an interest in the stock of the company to the amount so raised. Nothing could be more explicit than that letter, which gives at once a full explanation of the agreement made with Mr. *Stringer* as the managing director of the company.

Mr. *Pearson*, in reply.

SIR R. MALINS, V.C. :—

This is a matter which has been very truly said to involve considerations of the highest importance to the public; for if the contention raised by the official liquidator in this case were to succeed it would add another to the misfortunes of persons engaged in any way with these companies, and it would be impossible at any time to know that a transaction apparently concluded might not by the ingenuity and research of official liquidators and their counsel be brought into question.

The case arises out of the transactions of a company which has been before me on more than one occasion, and which was formed at the time of the American War, not for the avowed but for the actual purpose of purchasing goods in *England*, running the blockade with them, paying for cotton in *America* by means of goods, and returning with cotton; and whenever the operation was successful it was carried on with great profit, because they obtained cotton at a low price and could sell it in the English market at a very high price. Unfortunately for them the undertaking was eminently unsuccessful, so that at a very early stage of their operations many of their ships were taken, the cotton which they relied upon obtaining from *America* was burnt by the Federal Government, and the whole thing ended in disaster. Among the persons who took shares in the company, Baron *Schroder* was the holder of five shares on behalf of Mr. *Moffatt*. Now the transaction, about which there is no question of fact between the parties, is this: When the company was formed, on the 27th of June, 1863, the Confederate Government, as is well known, had raised large sums of money in the European markets, not exclusively in the English markets, by issuing what were called "Confederate or Cotton Bonds." They were recognised

in *Europe* as a belligerent state, as having an independent existence, and they did that which all other states in *Europe* have done and are doing—issued bonds payable in money; but in this case they were not merely payable in money, but at the option of the holders the bonds were payable in cotton, to be taken at 6*d.* per pound. Of course, if the holders of these bonds could get cotton in *America* at 6*d.*, and bring it here and sell it at 2*s.*, it would have been an operation of enormous profit. These bonds, therefore, it is a matter of history and public notoriety, were issued to a very large amount. Baron *Schroder*, who has given his evidence in a very straightforward and satisfactory manner, states he was not the agent for the issuing of the bonds, but that *Erlangder & Co.* of *Paris* were, and that he was their *London* agent, and conducted all the business in this country merely as the agent of the *Paris* firm. These bonds were issued to the extent of £3,000,000, and there were applicants for £15,000,000, so that the whole of the bonds were issued. The fortunate holders, as they thought themselves at that time, got them at £90 per cent., the price at which they were issued, and bearing 7 per cent. interest. When Mr. *Moffatt* applied for the five shares in this company, he agreed with Mr. *Stringer*, the manager of the company, with the directors of the company, and everybody who had a right to a voice in the management of its affairs, that his shares were to be paid for thus: £500 in cash, and £5000 in bonds at £90; and in this way the £5000 was to be made up.

Accordingly, on the 2nd of July, 1863, he gave Baron *Schroder*, who was his agent in the matter, and who has been brought here because his name appears upon the register, a cheque for £500. That cheque was handed over to the company in part payment of the £5000, and in the month of August following, the particular day does not appear, Baron *Schroder*, on behalf of Mr. *Moffatt*, or Mr. *Moffatt* himself, handed to the company the Confederate bonds for £5000, and in the company's ledger on one side, "*Schroder*, Esquire" (as he is called there), is debited with £5000 issue capital; and he is credited cash on the 2nd of July, £500, and on some day in August (the day is not stated), "Confederate bonds, £5000 at £90, £4500;" and there the account is balanced, so far as the ledger is concerned. Then we come to the share

V.-C. M. 1870 SCHRODER'S CASE.

register, where I find he is entered as the holder of five shares, consecutively numbered, of £1000 each, stated to be paid up in full upon each.

I am now appealed to on behalf of the creditors of this company. Of course creditors may be, and frequently are, deceived; but the principle of these joint stock companies is, that the creditor looks at the register of shareholders and nothing else; and if a creditor goes into the office of a company with which he is about to deal, and asks to see, as he is entitled to do, the list of shareholders, and he finds upon that register that Baron *Schroder* for instance, a gentleman of responsibility, is entered as a shareholder, and at the same time he finds that he is entered as having his shares paid up in full, I cannot hear him in this Court say that he has dealt with the company upon the faith that he was entitled in any way to look to Baron *Schroder* for payment, or that he believed he had anything to receive from him. On the contrary, it is shewn that, from the only document accessible to him, these shares were stated to have been paid up in full. But in this particular case I cannot overlook the fact that the only creditor of the company has been the *Agra and Masterman's Bank*, who had very large dealings with the company, who had several accounts with the company, who had advanced them money generally and upon special undertakings and securities, and who had the fullest knowledge of all the transactions of this company. Lord Justice *Giffard* said, when *Stringer's Case* was upon appeal from my decision, "This was not done in any underhand manner" (that is, the payment of dividend); "the whole thing was patent and open. It was known, or capable of being known by every shareholder; and if the directors of the *Agra and Masterman's Bank* did not know anything about it they neglected their duty, and behaved most shamefully to their own shareholders, whose money they lent; for the balance-sheet was put in their hands, and they had accounts of every description, and they must have known perfectly well that it was neither more nor less than a blockade-running company. The very nature of the accounts shewed it;" and it was judicially noticed by the Lords Justices, in terms much stronger than I thought myself at liberty to use, that this was a case of the *Agra Bank:* the *Agra Bank* are here, in fact, the claimants, they being the only creditors

of this company. On that account alone it was that the Lords Justices thought the claim of the *Agra and Masterman's Bank*, who were substantially the claimants through the official liquidator, was unworthy of notice.

Now, the only question I am called upon to decide here is, can this payment for these Confederate bonds, to the extent of £4500, be taken as a valid payment, or were they taken by way of security, so that the official liquidator is entitled to say, that as they have never been realised, and they are now utterly worthless, therefore those who pledged them as security must pay that which they represented, namely, £4500.

First, then, were they taken by way of security, or were they taken as actual payment? The only thing that I have heard suggested, worth a moment's consideration, upon the question whether they were taken as actual payment or not, is the letter of the 28th of July, 1863, from Mr. *Stringer*:—[His Honour read the letter.] Now, first of all, does this letter apply to this transaction at all? I am clearly of opinion that it does not, and for this reason, that this was a transaction carried into effect, except as to handing over the bonds, long before this letter was written, for the £500 was paid on the 2nd of that month (this letter being written on the 28th) as part performance of the contract already entered into, viz., that these shares should be taken in consideration of £500 money and £5000 Confederate bonds, which were then worth £900 each. It was in point of fact an agreement to take shares in consideration of bonds, plus the amount of the difference between the market value of the bonds and their nominal value. Therefore this refers to future transactions: the words are, "those who subscribe to our increased capital." That cannot, in my opinion, have any reference to transactions already concluded by Mr. *Stringer*, who, if he had any evidence to give upon the subject, ought to have been brought here to state whether the transaction was properly represented by the entries in the book, and I must collect the transaction not from this letter, which binds nobody, but from the transaction which took place, and which binds every one. I consider the entry in the journal a very material fact, where I find this statement: "To *George Moffatt*, £5000 Confederate Loan taken by this company at £90." Am

V.-C. M. 1870 SCHRODER'S CASE.

I to listen to a letter stating that they would only take the bonds by way of security when I find it recorded that the bonds were taken by this company at £90 in the books of the directors; and the manager and everybody perfectly knew it? I am satisfied that this claim is a most unconscionable demand of the *Agra and Masterman's Bank*. The only excuse they can make is, that it is raised by the official liquidator in order to see if he can snatch something out of the fire for the unfortunate persons, not creditors, but shareholders, who had the misfortune to lose by embarking in such a concern as this. I then refer to the ledger, where I find the account actually balanced by the Confederate Loan bonds, taken at £90, and there is no evidence to shew that the bonds were not worth £90; on the contrary, upon the evidence before me, it is perfectly clear that their market value in August, 1863, was £90; and Baron *Schroder* distinctly stated, in a manner which challenged cross-examination upon that subject, that they were at least of the value of £90. Suppose this case, that a shareholder, instead of paying in money, had offered to pay in consols, taking them at the price of consols on that day? and suppose consols which were at £90 had gone down 10 per cent. If the argument is good for anything the official liquidator might say, "We did take stock, but we had no right to do so, it was *ultrà vires;* and now, the stock having gone down 10 per cent., you must pay me £500." In my view, a proposition so monstrous could not be maintained in a Court of justice. Mr. *Moffatt* might have gone to the market and realised his bonds for £4500. Why he did not do so I cannot tell. It may have been to meet the views of the company, and I am very much inclined to think it probably may have been so. If he is right in stating that the bonds were realisable in the market for £4500, it must have been a matter of perfect indifference to Mr. *Moffatt* whether he handed over his bonds or whether he went into the market and sold them, and handed over the money they produced. Therefore, in my opinion, it was to suit the convenience of Mr. *Stringer*, and those associated with him, that they took the bonds instead of money, and having taken bonds, I am clearly of opinion they are bound by the transaction.

Upon the authorities which have been cited to me, it is perfectly clear to my mind that there is no such principle as that a company

may not receive payment of its shares in money or money's worth. I know that in one of the cases in this company which was before me, a shareholder, instead of paying money, paid in tea, as he was a dealer in tea. I thought that a perfectly valid payment, because the object of the company was to send tea, and all other things that were required by the Confederate Government, to the *Confederate States*, and if they found it more convenient to take £1000 worth of tea than £1000 in money, I think it would be a monstrous proposition to say that they were not authorized to take anything but money for the payment of their shares, and if they chose to keep the tea by them till it became rotten and valueless, then the official liquidator might as well have said there was no power to take anything but money: "You gave tea, they ought not to have taken tea; true it is that the tea was kept till it was rotten and of no use, but, nevertheless, although we induced you to give us tea, you must now pay £1000, as if we had taken nothing whatever." In this case they were at liberty to take money or money's worth. The bonds were money's worth, things which they could have turned into money any day they thought fit. It suited their convenience to take the money's worth, and having done so, by that transaction, in my opinion, they are completely bound. I cannot imagine a more unconscionable claim, and I should never have allowed it to be brought forward if I had been appealed to. I am perfectly satisfied, upon the evidence, it was the intention of all parties to conclude the transaction, as the documents shew, by handing over the shares as actual payment, and not by way of security. It is a payment which they were on their side at liberty to accept, and having been accepted, in the conclusive manner which I have stated, the transaction was thereby concluded, and therefore Baron *Schroder's* name must be taken off the list of contributories.

Solicitors for Baron *Schroder:* Messrs. *Thomas & Hollams.*

Solicitors for the Official Liquidator: Messrs. *Ashurst, Morris, & Co.*

V.-C. M.
1870
Nov. 25.

FOX *v.* FOX.

Covenant to settle—Will—Hotchpot Clause—Satisfaction—Share of Residue—Amount of Estate for Distribution.

A testator, after providing for the payment of his debts, directed that his residuary estate should be divided amongst his nine children equally if it did not exceed £40,000, but if it exceeded that amount, in such a way that the shares of his sons should be one-twentieth greater than the shares of his daughters. He then recited that he had covenanted, in the marriage settlement of one of his daughters, to make a certain provision for her, and directed that any money paid by his executors to the trustees of the settlement in pursuance of the covenant should be taken *pro tanto* as part of the daughter's share under the will, and brought into hotchpot and accounted for accordingly. The state of the testator's property was such that it exceeded £40,000 if the amount which the executors became liable to pay under the covenant was included in it for the purpose of distribution, but not otherwise :—

Held, that the effect of the hotchpot clause was to make the estate for the purpose of distribution, as if the debt created by the covenant had never existed, and that it must be distributed as exceeding £40,000.

CHARLES JOSEPH FOX, by his will, dated the 6th of June, 1870, gave his real and personal estate to trustees upon trust to sell and convert into money and to pay thereout his funeral and testamentary expenses and debts, and certain other charges and his legacies, and, after directing the residue to be invested, continued as follows : "And I declare that the said trustees or trustee shall stand possessed of the said moneys, stocks, funds, shares, and securities (hereinafter referred to as the said trust premises), in trust for all such of my nine children as shall be living at my death, and as being sons or a son shall attain or have attained the age of twenty-four years, or being daughters or a daughter shall attain or have attained that age, or shall marry or have married under that age, the objects of this present trust, if more than one, to be entitled in equal shares as tenants in common, except as hereinafter provided : Provided always, that if at the time of my death the net value of my real and personal estate, after payment of or allowing for my debts and funeral expenses, and the expenses of proving my will, and the legacies given by this my will, or by any codicil thereto, shall amount to or exceed the sum of £40,000, then the said trust premises divisible among such of my children

as shall attain vested interests therein under the trusts hereinbefore contained shall be so divided between them that the share of each son shall be one-twentieth part (the whole being considered as divided into twenty parts) more than the share of each daughter."

After a clause immaterial to the present purpose the will continued as follows: "And whereas by the settlement made on the marriage of my daughter *Constance Catherine Tawney* with *Charles Henry Tawney*, and dated on or about the 2nd day of July, 1867, I have covenanted with the trustees of such settlement that if the share of the said *Constance Catherine Tawney* assigned by the last-mentioned settlement in the trust funds settled by the settlement made on my own marriage with my late wife should not amount to the sum of £4000, then that my executors or administrators should within six calendar months after my death pay to the trustees or trustee of the said settlement executed on the marriage of my said daughter such a sum of money as, together with the share of the said *Constance Catherine Tawney* assigned by the last-mentioned settlement in the last-mentioned trust fund, would amount to the sum of £4000, or, in the event therein mentioned, to the value of one-ninth part of the real and personal estate I shall die possessed of. Now I declare that any sum which my executors may become liable under the said covenant to pay to the trustees or trustee of the settlement made on the marriage of the said *Constance Catherine Tawney* shall be taken in or towards satisfaction *pro tanto* of the share of the said *Constance Catherine Tawney* under this my will in the said trust premises, and shall be brought into hotchpot and accounted for accordingly."

The testator died on the 28th of June, 1870, leaving nine children, two of whom were sons.

By the settlement on the marriage of Mrs. *Tawney* so referred to, which was dated the 2nd of July, 1867, it was covenanted that if the share assigned to Mrs. *Tawney* in the trust funds settled by the settlement made on the marriage of the testator should not at his death amount to the sum of £4000, his executors and administrators should within six calendar months after his death pay to the trustees of Mrs. *Tawney's* settlement "such a sum of money as, together with the share of the said *Constance Catherine Fox* hereinbefore assigned of and in the last-mentioned trust fund, will

V.-C. M. 1870 Fox v. Fox.

amount to the sum of £4000, and that until the sum (if any) which shall become payable under this covenant shall be actually paid the same, or the unpaid part thereof for the time being, shall bear interest at the rate of £4 per centum per annum from the death of the said *Charles Joseph Fox:* Provided always, that if the sum which but for this present proviso would have been payable at the death of the said *Charles Joseph Fox* under the covenant lastly hereinbefore contained shall exceed in amount the value of one equal ninth part of the real and personal estate which the said *Charles Joseph Fox* should die possessed of or entitled to, then and in such case the sum payable under such covenant shall be equal in amount to one equal ninth part of such estate, and no more."

The share of Mrs. *Tawney* under the testator's marriage settlement was £503 13*s.* 8*d.*, and as one-ninth of the testator's estate exceeded £4000, the sum payable to Mrs. *Tawney's* trustees was £3496 6*s.* 4*d.* The total amount of the testator's estate after payment of debts, but including the £3496 6*s.* 4*d.*, was £42,938 7*s.* 5*d.*, and consequently his estate exceeded £40,000 if that sum was included in it, but not otherwise.

The bill was filed by the two sons against the daughters and the trustees, and prayed that the trustees might be restrained from dividing the estate otherwise than by giving the Plaintiffs shares one-twentieth larger than the shares of the daughters.

The present application was for an injunction in terms of the prayer.

Mr. *Charles Hall*, and Mr. *Lake*, for the Plaintiffs:—

The liability to make up the deficiency in the settlement fund was, for the purpose of payment, only a debt to be discharged before distribution of the estate. But though for the purpose of payment it was taken out of the estate, it has been brought back again for the purpose of distribution. It is directed to be brought into hotchpot, which is defined by *Littleton* (1) to be "not one thing alone, but one thing with others together." The result is, therefore, the same as if the estate had never been diminished. The case resembles *Maclaren* v. *Stainton* (2), in which the effect of a similar hotchpot clause was explained. The intention is made

(1) Co. Litt. 176 b. (2) 3 D. F. & J. 202.

clear by the reference to the covenant, as was held in *Davenport* v. *Hinchcliffe* (1).

Mr. *Bristowe*, Q.C., and Mr. *Springall Thompson*, for the daughters:—

The obligation created by the covenant is a specialty debt to be satisfied before distribution of the estate. The covenant is for payment to the trustees of the settlement, and consequently the gift, which is direct to the daughter, is not a satisfaction: *Chichester* v. *Coventry* (2). In that case Lord *Chelmsford* shewed that a share of a residue had never been treated as a satisfaction of a debt. It would be proper to deduct the sum in question from the estate before payment of probate duty, and it ought not to be treated as part of the estate for any purpose which the testator has not expressly directed. He has only made it so for the purpose of calculating the amount of Mrs. *Tawney's* share under the will.

Mr. *Druce*, for the trustees.

Sir R. Malins, V.C.:—

This is a mere question of intention, and I entertain no doubt whatever about it. When the testator directs that the sum which his executors may become liable to pay under his covenant is to be taken towards satisfaction of Mrs. *Tawney's* share under his will, and brought into hotchpot, that is equivalent to saying that the obligation of the covenant must be satisfied out of Mrs. *Tawney's* share, and the amount available for distribution virtually included the sum paid by his executors to the trustees of the settlement. Having contracted a debt by the covenant, the testator treats his property for the purpose of distribution as if the debt had never existed. In my opinion, it must be treated for all purposes, except payment to the trustees, exactly as if no such debt had ever existed, and the estate must be treated as exceeding £40,000; and the Plaintiffs will be entitled to have their shares one-twentieth part greater than the shares of the daughters. The injunction will therefore be as prayed.

Solicitors: Messrs. *Ley & Scott*, agents for Messrs. *Danger & Cartwright, Bristol;* Messrs. *Smith, Guscotte, & Wadham.*

(1) 1 J. & H. 713. (2) Law Rep. 2 H. L. 71.

V.-C. M.
1870
Dec. 9.

Post 576
Ch 360

In re THOMSON'S TRUSTS.

Will—Construction—Implied Gift—Conditional Gift over.

A legacy was directed to be held on trust for *D.*, "should he survive my sister *T.*; should he not survive her, nor attain his twenty-first year," over :—*Held*, that an absolute gift to *D.* at twenty-one must be implied.

ELIZABETH THOMSON, by her will, which was dated the 17th of November, 1842, made the following appointment and bequest: "I appoint my cousin, the Reverend *James Donne*, to be my executor, and I give him in trust £1000, to pay the interest thereof to my sister, *Ellen Barbara Thomson*, for her life, and at her death I give that sum wholly to my nephew, *Robert James Donne*, should he survive my sister, *Ellen Barbara Thomson*; should he not survive her, nor attain his twenty-first year, then I give that sum, at the death of my sister *Ellen*, to *Lætitia Donne*."

The testatrix, after bequeathing other legacies, directed her residuary estate to be divided amongst three of her cousins equally.

The testatrix died on the 9th of May, 1844. The nephew, *Robert James Donne*, attained twenty-one, and died on the 8th of September, 1863. *Ellen Barbara Thomson* died on the 31st of January, 1870, and the £1000 legacy was paid into Court on the 30th of June, 1870. *Lætitia Donne* died on the 4th of September, 1851.

The executors of the legatee, *Robert James Donne*, now petitioned for payment of the legacy.

Mr. *Pearson*, Q.C., and Mr. *Haynes*, in support of the Petition :—

If the words are taken literally the legacy will, in the events which have happened, fall into the residue. But the testatrix has, by making a gift over, shewn that she never intended such a result: *Ingram* v. *Suckling* (1). If an absolute gift is implied at twenty-one, the manifest intention of the will will be carried out: *Bree* v. *Perfect* (2); *Bland* v. *Williams* (3).

(1) 7 W. R. 386. (2) 1 Coll. 128.
(3) 3 My. & K. 411.

Mr. *Edward Harrison*, for the representative of *Lætitia Donne* :—

The will may be explained without the implication of any gift. The word "nor" may be considered as compounded of "and not," or "or not." Here it is plain that the testatrix intended "or not," so that the legatee over should take in either event. If that construction does not prevail, the case must be treated as an executory devise, and the condition can only take effect when supported by the gift over: *Gulliver* v. ~~*Ashby*~~ (1). The present case is within *Brownsword* v. *Edwards* (2), which was not treated as having been overruled by *Grey* v. *Pearson* (3).

Mr. *Osborne*, Q.C., for parties representing a share of the residue :—

The question is, whether an absolute interest can be implied on the legatee attaining twenty-one. In *Malcolm* v. *O'Callaghan* (4) the contrary was held.

[The VICE-CHANCELLOR :—Is that case consistent with *Clifford* v. *Beaumont?* (5)]

There is no inconsistency; and the same view was taken in *Fitzhenry* v. *Bonner* (6).

Mr. *Hanson*, for parties similarly interested, referred to *Wing* v. *Angrave* (7).

Mr. *A. Bailey*, for parties representing another residuary share.

SIR R. MALINS, V.C. :—

The present question arises upon the construction of a very few words. The form of the gift makes the legacy contingent on the legatee surviving the sister of the testatrix. Then the testatrix having introduced one contingency into the gift makes a gift over upon a different contingency. The question is, what effect is to be given to the contingency in the gift over. The gift over is to take effect in case the legatee does not survive the sister nor

(1) ~~4 Burr. 1929.~~ 1 Wils 105.
(2) 2 Ves. Sen. 243.
(3) 6 H. L. C. 61. 3 Jur N.S. 822.
(4) 2 Madd. 349.
(5) 4 Russ. 325.
(6) 2 Drew. 36.
(7) 8 H. L. C. 183.

V.-C. M. 1870 — *In re* THOMSON'S TRUSTS.

attain twenty-one. For what reason can that condition as to attaining twenty-one have been put in? Obviously because the testatrix intended him to take absolutely in case he attained twenty-one. The effect of the whole gift shews a clear intention to make the legacy absolute if the legatee attained twenty-one. Where the intention is plain, but the language insufficient, the Court will aid the intention. It is urged by Mr. *Harrison* that the clause must be read in the alternative, as if the condition had been not surviving the sister or not attaining twenty-one; and that, therefore, in accordance with *Fitzhenry* v. *Bonner* (1) the gift over takes effect. But the gift over clearly fails, for the only ground on which the first gift could be held to have failed would be that the words must be taken quite literally, and in that view the case provided for by the gift over has not arisen. I am sorry counsel have not referred to the cases on which I founded my judgment in *Surtees* v. *Hopkinson* (2), which were three in number, *Hart* v. *Tulk* (3), *Langston* v. *Langston* (4), and *Key* v. *Key* (5). In commenting on *Key* v. *Key*, I remarked: "There, according to the strict words of the will, the devise to the son was made to depend on his surviving some of the annuitants; but as the literal adherence to the language would have defeated the manifest intention of the testator, it was disregarded." So, in the present case, I am satisfied that the legatee was intended to take an absolute interest on attaining twenty-one. In *Fitzhenry* v. *Bonner* there was no manifest intention shewn. It was merely a matter of conjecture what the testator had intended. The result is, that the gift to the nephew takes effect, and the gift over fails. The costs will be out of the fund.

Solicitors: Messrs. *Paterson, Snow, & Burney;* Messrs. *Bailey, Shaw, Smith, & Bailey;* Messrs. *Hunter, Gwatkin, & Hunter;* Messrs. *Meredith & Co.;* Messrs. *Dean & Taylor.*

(1) 2 Drew. 36.
(2) Law Rep. 4 Eq. 98.
(3) 2 D. M. & G. 300.
(4) 2 Cl. & F. 194.
(5) 4 D. M. & G. 73.

In re KING'S CROSS INDUSTRIAL DWELLINGS COMPANY.

V.-C. M.
1870
Dec. 3.

Company—Winding-up—Petitioning Creditor—Disputed Debt.

Where a creditor's Petition to wind up a company is opposed on the ground that the petitioning creditor's debt is disputed, the Court will not, as a matter of course, direct the Petition to stand over, with leave to being an action; but is bound, before doing so, to see that the debt is disputed on some substantial ground.

THIS was a creditor's Petition to wind up the *King's Cross Industrial Dwellings Company, Limited.*

The company was constituted on the 16th of May, 1870, by registration of a memorandum and articles of association, with a capital of £46,000, in 23,000 shares of £2 each. Its principal object was the carrying on for profit or gain of the trade or business of providing healthy and comfortable dwellings.

The Petitioners were advertising agents, and soon after the registration of the company were applied to by Mr. *H. N. Barnett*, the secretary, to advertise the prospectus in various newspapers. Before doing so, they required him to shew some authority from the directors to act on behalf of the company, and he produced the minute-book of the company, and pointed to a resolution passed at a board meeting of the directors: "That the prospectus be issued as soon as the executive of the company can be completed, and that the honorary secretary be hereby empowered to take such measures as he may deem necessary for securing due publicity for the same."

The Petitioners thereupon, and acting, as they alleged, on the authority of that resolution, caused the prospectus to be advertised, and made out a bill for advertisements of £78 16*s.* 6*d.*, and on the 2nd of September, 1870, served upon the secretary a written demand for payment of £78 16*s.* 6*d.*, alleged to be due.

The bill having remained unpaid for more than three weeks, notwithstanding further applications, the present Petition was presented.

The company did not dispute the fairness of the charges, or

V.-C. M. 1870 — *In re* KING'S CROSS INDUSTRIAL DWELLINGS COMPANY.

raise any question as to whether the money had been properly spent; but set up an agreement alleged to have been entered into, on behalf of the company, between a Mr. *Robinson*, one of the directors and the largest shareholder in the company, and the secretary, that the latter should pay all preliminary expenses, except law costs, of the formation of the company, up to the time of the allotment of the shares, for which he was to receive £1000; and stated that Mr. *Robinson* had himself informed the Petitioners of the arrangement, and that the advertisements had been made before the allotment of shares, and consequently that the debt was not the debt of the company.

Mr. *Higgins*, for the Petitioners:—

This is simply a Petition presented under the 1st sub-section of sect. 80 of the *Companies Act*, 1862, on the ground of non-payment of a debt for three weeks after a demand in writing. The Petitioners took the precaution of ascertaining that the secretary had authority to pledge the credit of the company before doing any work for them.

Mr. *Glasse*, Q.C., and Mr. *A. E. Miller*, for the company:—

Where the debt of the petitioning creditor is disputed, the proper course is to direct the Petition to stand over, with leave to bring an action, and then to make an order on the Petition when judgment has been obtained in the action: *Bowes* v. *Hope Mutual Insurance Company* (1). There is a *bonâ fide* question here, whether there ever was any debt incurred by the company; and that is a matter of evidence which can be much more easily ascertained at Common Law than in this Court. The evidence shews clearly that the Petitioners were aware that the secretary, and not the company, was liable for preliminary expenses.

SIR R. MALINS, V.C., after referring to the facts, continued:—

Advertisements were a necessary preliminary expense in the formation of the company, in order that the shares might be taken up. If one thing is plain, it is that the secretary has implied authority to pledge the credit of the company for issuing adver-

(1) 11 H. L. C. 389.

V.-C. M. 1870 *In re* KING'S CROSS INDUSTRIAL DWELLINGS COMPANY.

tisements, of which the company is to have the benefit or chance of benefit. It is admitted that the advertisements appeared, and that the secretary acted under the authority of the company. [His Honour then proceeded to discuss the evidence, and continued :—] The evidence is really only one way—that the Petitioners gave credit to the company. They had no other course for obtaining payment, except to bring an action and obtain judgment; and then they would have received nothing, except by taking out an execution, which would have produced nothing. It is said that this is a *bonâ fide* question, whether there is or not a debt of the company; but, in my opinion, the Court is bound in such a case to see that the question is a substantial one before directing an action to be brought. I entertain no doubt that this is a debt of the company, and I should be doing the greatest possible injustice if I allowed any further litigation. I can only make the usual order to wind up, but direct it not to be advertised for a fortnight, in order to enable the company to pay the demand.

Solicitors: Messrs. *Bellamy & Strong;* Messrs. *Walter & Moojen.*

V.-C. M. 1870 *Dec.* 10.

In re MARSEILLES EXTENSION RAILWAY AND LAND COMPANY.

Ex parte EVANS.

Company—Solicitor—Taxation—Winding-up.

Three months after a solicitor to a company had delivered his bill of costs the company was ordered to be wound up. Subsequently he delivered a further bill to the official liquidator. More than twelve months elapsed, and the solicitor carried in a claim for payment of both bills :—

Held, that both bills must be referred for taxation before they could be paid.

THIS was a claim carried in by the solicitor of the *Marseilles Extension Railway and Land Company, Limited*, in the winding-up for payment of his bills of costs.

At the time of the formation of the company, in the year 1866, Messrs. *Newbon, Evans, & Co.*, the predecessors of the present

V.-C. M. 1870

In re MARSEILLES EXTENSION RAILWAY AND LAND COMPANY. *Ex parte* EVANS.

applicants, Messrs. *Evans & Co.*, were appointed solicitors to the company.

In January, 1867, Mr. *Evans*, who was then the senior partner in the office, delivered to the secretary to the company a bill of costs amounting to £797 16*s.* 2*d.*, for business transacted for the company during the year 1866.

On the 11th of February, 1867, a Petition was presented to wind up the company, and a winding-up order was made in April, 1867.

In June, 1868, the liquidators made out a list of claims against the company, in which Messrs. *Evans & Co.* were entered as creditors "for account rendered to 31st of December, 1866, £750; further amount estimated, £150."

On the 3rd of December, 1868, Messrs. *Evans* delivered to the official liquidator a further bill of costs for £195 4*s.* 1*d.* Nothing further took place till the present summons was taken out in April, 1870. The official liquidator refused to allow the claim without a reference for taxation.

Mr. *Glasse*, Q.C., and Mr. *Waller*, in support of the claim:—

A full year having elapsed since the later of the two bills was sent in, the only question is, whether the fact of a winding-up having taken place makes any difference as to the right of the solicitor to have his bill paid without taxation, there being no special circumstances alleged. It has been already determined, *Re James* (1), that the rule as to taxation is not affected by a winding-up. A client necessarily waives his right to taxation by taking no step within the year: *In re Gedye* (2). The right to a taxation applies exclusively to a solicitor's bill, and must be construed strictly; otherwise it would be in the power of a liquidator to keep a solicitor waiting an indefinite time for payment of his bill of costs. To make an order for taxation is to say that sect. 37 of the *Attorney and Solicitors Act* (6 & 7 Vict. c. 73) has no application in the case of a company.

Mr. *Cotton*, Q.C. (Mr. *Gill* with him), for the liquidator:—

The present summons is not one by a solicitor for payment of

(1) 4 De G. & Sm. 183. (2) 14 Beav. 56.

his bill of costs, but is a claim to prove as a creditor of the company for a debt. The liquidator must investigate the claim, and see what items in it are proper to be charged, and the easiest mode of doing so is by a reference to the Taxing Master, who has all the machinery for investigating solicitors' bills. The Court must be satisfied that the charges were such as the company ought to be made to pay. The first bill was delivered before the winding-up, but not twelve months before, which distinguishes the case from *Re James* (1), and after the winding-up the liquidator had no power to apply for taxation, not being able to undertake to pay what should be found due. As to the second bill, the liquidator is not the party chargeable, and does not represent the parties who are chargeable. He is not like an executor, for no action could be brought against him on the bill.

Mr. *Glasse*, in reply:—

In *Re James* the liquidator was treated as the party chargeable. The simple case is, that the first bill was delivered before the winding-up, and the liquidator obtained no order for taxation. The second bill was delivered to the liquidator himself, and he took no steps to have it taxed. Both bills are absolutely good, unless they can be brought within sects. 37 and 38 of the *Attorney and Solicitors Act* (6 & 7 Vict. c. 73): *In re Barnard* (2).

SIR R. MALINS, V.C., after stating the facts, continued:—

The question is, whether or not the *Attorney and Solicitors Act* (6 & 7 Vict. c. 73) applies to the case, and, by consequence, the amount of the bill is conclusive against the company; in other words, whether the bill is subject to taxation. If the bill had been delivered twelve months before the winding-up, the case would have been exactly like *Re James*, but in the present case the bill was liable to taxation at the date of the winding-up. There seems, however, much force in the argument that the mere intervention of a winding-up ought not to prevent the expiration of the period for taxation, but I think that the true principle on which a winding-up should be considered is fatal to that contention. The first duty of the official liquidator, after the commencement of the winding-up, is to find

(1) 4 De G. & Sm. 183. (2) 2 D. M. & G. 359.

V.-C. M. 1870 — *In re* MARSEILLES EXTENSION RAILWAY AND LAND COMPANY. — *Ex parte* EVANS.

out the amount of the claims against the company at the time of the winding-up. The claim of Mr. *Evans* was made upon a bill then subject to taxation. Therefore, it appears that his right to prove against the company was for the amount of his bill after taxation. It has been argued that it was the duty of the liquidator to have the bill taxed within the proper period. But the answer to that argument is conclusive, that the affairs of a company at the beginning of a winding-up are usually in such a state of confusion that it would be a great hardship to say that the liquidator must apply for an order for taxation immediately, without knowing whether the assets of the company are sufficient to pay the bill when taxed, though it would be necessary for him on obtaining the order for taxation to undertake to pay the amount which should be found due. I consider it the duty of the liquidator to see that no more claims are sustained against the company than are actually due, and to ascertain that in the case of a solicitor's bill, just as much as in that of any ordinary tradesman. I therefore think that the first bill ought to be taxed.

As to the second bill, I treat it as a claim made in the winding-up, and cannot consider that it was the duty of the official liquidator to take it into taxation at once. I have recently held that the winding-up makes a complete change in the relative position of all parties as regards a company, and I must treat the case as if the rights of all parties had remained just as they were at the time of the winding-up. There will, consequently, be a reference for taxation of both the bills. The official liquidator may have his costs out of the estate.

Solicitors: Messrs. *Evans & Co.;* Messrs. *Hathaway & Andrews.*

In re WOOD'S TRUSTS.

V.-C. M.
1870
Dec. 16.

Costs—Trustee Relief Act—Payment of Money into Court—Petition as to Dividends only—Costs of Trustee.

Where a fund had been paid into Court under the *Trustee Relief Act* on account of the inability of a sole trustee to act:—

Held, that, on an application relating solely to the payment of the dividends, the costs of the appearance of the trustee might be properly charged on the *corpus*.

THIS was a Petition for payment of the dividends on a fund paid into Court, under the *Trustee Relief Act*, to a person entitled to a life interest in the fund.

The fund arose from certain freehold, copyhold, and leasehold property, which, together with some personalty, was given to two trustees, upon trust to sell, and invest and to pay the income to the testator's widow, the Petitioner *Charlotte Wood*, during her life, and after her death upon trust for several persons absolutely.

The property was sold and the proceeds were invested in the 3 per Cents., and the last surviving trustee died on the 18th of July, 1859, having, by his will, appointed *Thomas Menzies* and *W. L. Craighead* his executors, and the fund was transferred into the joint names of the executors and the Petitioner. *W. L. Craighead* had since died, and *Thomas Menzies* was a seaman in the merchant service, who was seldom in the *United Kingdom*, and consequently unfit to act personally in regard to the property.

The Petitioner was of considerable age, and as the fund would become distributable on her death, and some doubt existed as to some of the parties entitled, it was thought desirable to pay the money into Court, instead of having fresh trustees appointed.

The Petition asked that the costs of the appearance of the trustee might be paid out of the *corpus* of the fund.

Mr. *Millar*, for the Petitioner:—

If the fund had not been paid into Court it would have been necessary to petition for the appointment of new trustees, and in that case the costs of the trustee would have been thrown upon

V.-C. M. 1870 — *In re* Wood's Trusts.

the *corpus;* and, under the circumstances, it would not be right that they should now be paid by the Petitioner.

Mr. *Woodhouse*, for the trustee:—

The latest authorities have decided that the costs of an application with reference to income only must be paid out of the income of the fund exclusively: *In re Whitton's Trusts* (1); *In re Smith's Trusts* (2).

Sir R. Malins, V.C.:—

My view is, that when money is paid into Court the costs of any application as to a life interest ought to be borne by the *corpus* of the fund. The money is paid into Court for the benefit of all persons interested in it, and the necessary result of its being paid in is, that there must be an application for payment of the dividends to the persons interested. The expense of such application arises from an act done for the benefit of all, and therefore all ought to bear the cost. In the present case the benefit is clearly to the persons entitled to the *corpus.* Whatever may be now the general rule as to these costs, it would be most unreasonable that the present Petitioner should have to pay the costs of the appearance of the trustee. In this case, therefore, I shall adhere to my own view, and the costs of the trustee must be paid out of the *corpus.*

Solicitors: Messrs. *Smith, Stenning, & Croft;* Messrs. *Langham & Sons.*

(1) Law Rep. 8 Eq. 352. (2) Law Rep. 9 Eq. 374.

In re SOUTH ESSEX ESTUARY COMPANY. *Ex parte* CHORLEY.

V.-C. M.
1870
Aug. 2, 3;
Nov. 25.

Company—Contractor—Invalid Issue of Bonds—Purchaser for Value—Acknowledgment by Company.

Lloyd's bonds payable in three years, with interest in the meantime, were given by a company to their contractor as compensation for the surrender of the contract. Two of these bonds were purchased for value from the contractor, without notice of the arrangement between him and the company. The bonds and the transfers were registered in the company's books. The transferee sued the company for eighteen months' interest, and recovered the amount due. Subsequently proceedings at law were taken against the company to recover principal and interest, and judgment was entered up by consent against the company, which was then ordered to be wound up:—

Held, upon adjourned summons, that, whether the bonds were valid or invalid in the hands of the contractor, the official liquidator was precluded by the subsequent conduct of the company from questioning their validity in the hands of a purchaser for value without notice. The transferee was therefore admitted as a creditor of the company for principal, interest, and costs.

THIS was an adjourned summons upon an application to admit *George Chorley*, the trustee of the marriage settlement of Mr. and Mrs. *Yates*, as a creditor of the *South Essex Estuary and Reclamation Company* for £1000, and interest, in respect of two *Lloyd's* bonds of the company for £500 each, dated the 5th of November, 1863.

The company was incorporated by special Act of Parliament, under which it had a power of borrowing limited to one-third of the capital paid up. No capital, however, had been paid up when the bonds were issued under the circumstances hereinafter stated.

The scheme was promoted and the Act of Parliament obtained by and at the expense of Mr. *Thomas Hutchings*, a contractor, who was one of the original directors of the company. Mr. *Hutchings* afterwards retired from the board of directors for the purpose of tendering as contractor for the execution of the works required to be done by the company, and paid-up shares, representing the sum of £10,000, were given to Mr. *Hutchings* as compensation for the money and trouble he had expended in getting up the company and procuring the Act of Parliament.

V.-C. M.
1870
In re South Essex Estuary Company.
Ex parte Chorley.

A contract was then entered into with Mr. *Hutchings* for the execution of certain works, and he was afterwards engaged, with the sanction of the directors, in negotiating a loan to enable him to carry out the contract. On the 14th of October, 1863, Mr. *Hutchings* reported that he had entered into negotiations which were calculated to secure the completion of a portion of the works; and on the following day, at a board meeting of the directors, it was resolved that, in order to facilitate the arrangements necessary for carrying out the proposed negotiations, the contract with Mr. *Hutchings* should be rescinded; and in consideration of his surrendering such contract he was to be paid the sum of £15,000, such sum to be secured by bonds of the company payable in three years, with interest at the rate of £5 per cent. per annum; that such bonds be issued in such amounts and payable to such persons as Mr. *Hutchings* might desire, but that before receiving them he should execute a release of all claims which he might have upon the company in respect of the contract or on any account whatever, such bonds to be in addition to the 200 paid-up shares previously given to him. Mr. *Hutchings* agreed to this arrangement, and at the same board meeting he was re-elected a director of the company.

The bonds were in the following form:—"The *South Essex Estuary and Reclamation Company* do hereby acknowledge that they stand indebted to *Thomas Hutchings*, of 13, *Cannon Row, Westminster*, in the county of *Middlesex*, contractor, in the sum of £500 for money due and owing from the said company to the said *Thomas Hutchings;* and the said company for themselves, their successors and assigns, hereby covenant with the said *Thomas Hutchings*, his executors and administrators, to pay unto him, his executors, administrators, or assigns, the said sum of £500 upon the 5th day of November, 1866, and also interest thereon, at the rate of £5 per cent. per annum, from the date hereof until payment, such interest to be payable half-yearly upon the 5th day of May and the 4th day of November in each year. Given under the common seal of the company the 5th day of November, 1863." The bonds were signed by *W. Leman* and *W. Wright*, two of the directors, and *Robert Butt*, secretary.

In November, 1863, *Mary Yates*, being then a widow, purchased

from Mr. *Hutchings* two of the bonds so allotted to him, and paid for them the full sum of £1000; but not having received any interest upon them, she sued the company for the amount due up to the 5th of May, 1865, which was paid to her, with the costs of the action. In March, 1866, she intermarried with *William Yates*, her present husband, and previously to such marriage a settlement was executed by which she assigned to *George Chorley*, his executors, administrators, and assigns, among other things, the two bonds and all moneys due thereon, upon the trusts therein mentioned.

In January, 1867, *George Chorley* took proceedings against the company in the Court of Queen's Bench for the recovery of the principal moneys secured by the two bonds, and interest from the 5th of May, 1865.

The company pleaded to the action, but the plea was withdrawn upon an agreement that judgment should not be signed until the expiration of three months. Judgment was accordingly entered up against the company on the 2nd of March, 1868, for the sum of £1141 4*s.* 7*d.*, being the principal moneys and interest due up to that day; neither this sum nor the costs of the action had yet been paid.

The two bonds were registered in the books of the company as having been granted to *Thomas Hutchings*, and a transfer of such bonds to Mrs. *Yates* was subsequently registered.

The company was ordered to be wound up on the 24th of April, 1868.

The objections on the part of the official liquidator were, first, that there was no sufficient consideration for the debentures, the only alleged consideration being the cancellation by Mr. *Hutchings* of a contract with the company for the execution of a part of their work, and the loss of profit which he had expected to realise by carrying out the contract; secondly, that Mr. *Hutchings* had never executed the release, which he was bound to have done by the terms of the agreement with him before he received the bonds; and thirdly, that the directors had no power to issue the bonds in question.

Mr. *Pearson*, Q.C., and Mr. *Everitt*, in support of the claim:—

These bonds were issued by the company for the payment of

V.-C. M. 1870 *In re* South Essex Estuary Company. *Ex parte* Chorley.

money due to *Thomas Hutchings*, and were valid; but even if they were not valid as between the company and Mr. *Hutchings*, their validity cannot now be questioned. Mrs. *Yates* had no knowledge of the circumstances connected with the issue of the bonds; and her claim, and that of her trustee, must be admitted as purchasers for valuable consideration without notice. They are not bound by any equities which affect *Hutchings*, the original holder of the bonds. The company is estopped by the judgment.

These principles are established by *Williams* v. *St. George's Harbour Company* (1), *Higgs* v. *Northern Assam Tea Company* (2), and *In re General Estates Company* (3).

Mr. *Cotton*, Q.C., and Mr. *Decimus Sturges*, for the official liquidator:—

The first objection to this claim is, that there was no sufficient consideration for the debentures, the only consideration alleged being the cancellation by Mr. *Hutchings* of a contract with the company for the execution of a part of their works, and the loss of profit which he had expected to realise by the carrying out of the contract. Another objection is that, by the express terms of the resolution of the board under which the debentures were issued, it was stipulated that Mr. *Hutchings* should execute a release of all claims against the company in respect of the contract before he received the debentures. There is no evidence that any such release was ever executed, and there is no trace of its existence in the company's books.

We further object to the validity of the debentures, that there were not present at the meeting the requisite number of directors having in their possession the prescribed number of twenty shares in the undertaking. The resolution was therefore invalid. Mr. *Hutchings* had full knowledge that the persons dealing with him were not properly qualified to act, and was bound in Equity; and his assignee taking, subject to all equities, is equally bound.

Another objection is, that the company had no power to issue these debentures. The only power they had to borrow money was conferred by the Act, and never came into operation.

(1) 2 De G. & J. 547. (2) Law Rep. 4 Ex. 387.
(3) Law Rep. 3 Ch. 758.

That this claimant is bound by the equities which affect *Hutchings* is sufficiently clear by the cases of *In re Natal Investment Company* (1), and *Athenæum Life Assurance Society* v. *Pooley* (2). In the present case the bonds do not even purport to make the sum secured payable to bearer or to the holder for the time being, and are therefore even less like a promissory note or instrument negotiable at law than was the instrument in *In re Natal Investment Company*. These debentures were mere *choses in action*, transferable in equity only, and therefore subject, in the hands of the assignees, to all the equities between the original parties to the contract.

In many respects the case of *Athenæum Assurance Society* v. *Pooley* resembles this; and there it was held that, although the assignment of the debentures had been registered by the company, and interest paid upon them, the company was not bound by them.

Mr. *Glasse*, Q.C., and Mr. *C. Browne*, for two contributories.

Mr. *Pearson*, in reply, cited *Terrell* v. *Higgs* (3).

Nov. 25. Sir R. Malins, V.C.:—

There can be no doubt that these bonds were issued by the company with the intention that they should be negotiable; and it was clearly proved, and not disputed by the official liquidator, that Mrs. *Yates*, when a widow, purchased them for their full nominal value of £1000, which was paid by her by a cheque on her bankers.

It appears that Mrs. *Yates* subsequently sued the company for the interest due upon the bonds up to May, 1865, and this amount was paid her, together with the costs of the action. Then, in January, 1867, Mr. *Chorley*, the trustee of the settlement made upon Mrs. *Yates'* marriage with her present husband, took proceedings against the company in the Court of Queen's Bench for the recovery of the principal money secured by the bonds and interest from the last time of payment. The company pleaded to

(1) Law Rep. 3 Ch. 355. (2) 3 De G. & J. 294.

(3) 1 De G. & J. 388.

V.-C. M. 1870

In re South Essex Estuary Company. *Ex parte* Chorley.

the action, but the plea was withdrawn upon an agreement, dated the 30th of November, 1867, that judgment should not be signed for three months. At the expiration of that period, no further proceedings having been taken, judgment was entered up on the 2nd of March, 1868. In this state of things the winding-up process commenced, by the presentation of a Petition to wind up the company, on the 29th of February, 1868. The official liquidator resists the payment of the debt claimed, on the ground that the bonds were issued under circumstances which rendered them invalid in the hands of *Hutchings*, to whom they were originally issued, and that Mrs. *Yates*, though a purchaser for value, took them subject to the equities between the company and *Hutchings*; and that, as he could not have recovered upon them, she is in no better situation.

In the view I take of the case it is not now necessary for me to enter into the question of the original validity of the bonds in the hands of *Hutchings*. It may be assumed that while in his hands they were invalid, but they were intended to be assignable; they have been assigned for value, the assignment has been registered in the books of the company, and the liability of the company has been acknowledged in such a manner that the official liquidator is not, in my opinion, now entitled to question their validity. The actions at law on the bonds, and the final judgment obtained, are, I think, conclusive evidence of a debt against the company.

I delayed giving judgment in this case till after I had heard the case of the debentures in the *Imperial Land Company of Marseilles*, which I decided on Tuesday last. In the argument of that case a decision was cited which was not referred to in the argument of this case, which is, I think, conclusive in favour of this claim. I allude to *Hulett's Case* (1), where debentures were issued by a company in payment for work to a person who was styled an honorary director, but whose name was not inserted in the list of directors. He assigned the debentures to a third party, without notice of his having acted as a director, and judgment was recovered against the company for interest due upon the debentures. When the company was wound up, it was held that the assignee was entitled to prove on the debentures. In

(1) 2 J. & H. 306.

that case it was clear that the debentures were originally invalid, but there were circumstances sufficient to affect the company itself with knowledge of the transfer, and with that knowledge judgment was allowed to pass in the action brought by the assignee in the original holder's name for the interest due. After that, it was not open to the company to dispute the validity of the claim.

That a contract not originally binding upon a company may become so by a judgment obtained in an action upon it is also clear by *Williams* v. *St. George's Harbour Company* (1), cited in support of the claim. In that case a landowner withdrew his opposition in Parliament to a bill, on an agreement with the promoters that the company would take his land on certain terms. After the passing of the Act the landowner brought an action for breach of the agreement against the promoters, which was stayed on the company being made, by arrangement, Defendants to a new action, and suffering judgment for the demand; and it was held that the company thereby adopted the agreement, whether it would have been otherwise binding on them or not.

The case of *Higgs* v. *Northern Assam Tea Company* (2) is an important authority in favour of this claim. The decision of the Court of Appeal in *In re General Estates Company* (3) is also favourable to the Plaintiff's claim. In that case the directors had given, for value, an instrument under the seal of the company, headed "debenture," and stamped as a deed, by which the company undertook to pay to the order of *J. H.*, on the 1st of July, 1867, £1000, with interest half-yearly, on presentation of the annexed interest warrants. Their Lordships held, that the indorsee and transferee for value of this instrument was entitled to prove on it against the company, free from equities between *J. H.* and the company.

The claim for the principal, interest, and costs must therefore be allowed.

Solicitor for the Claimant: Mr. *Pearpoint.*
Solicitors for the Company: Messrs. *Western & Sons.*
Solicitors for the Contributories: Messrs. *Duncan & Murton.*

(1) 2 De G. & J. 547. (2) Law Rep. 4 Ex. 387.
(3) Law Rep. 3 Ch. 758.

V.-C. J.
1870
June 15, 23.

V.-C. B.
1870
July 22;
Aug. 2;
Nov. 11, 12;
Dec. 10.

In re ALBERT LIFE ASSURANCE COMPANY. *Ex parte* WESTERN LIFE ASSURANCE SOCIETY.

Joint Stock Companies — Amalgamation — Transfer of Assets — Indemnity — Failure of Indemnity — Unassigned Assets — Leases, Mortgages, and Re-assurance Policies — Vendor's Lien — Principal and Surety.

By an agreement in 1865 between three directors of the *Albert Company* and three directors of the *Western Society*, it was agreed that the *Company* should take upon itself all the liabilities of the *Society*; and that in consideration of such undertaking the *Society* should transfer to the *Company* all the funds and property of the *Society*.

Amongst the latter were a lease which had been taken in the name of a trustee for the *Society*; mortgages which had been made to trustees for the *Society* to secure sums advanced by the *Society* to mortgagors; and re-assurance policies which had been effected by the *Society* with other assurance companies on the lives of their own policy-holders, in order to cover part of the liability. On the execution of the agreement, the lease, mortgage deeds, and re-assurance policies were handed over, but the lease and mortgages were not, and had not since been, assigned to the *Company*. Several policy-holders of the *Society* did not accept the united *Company* as their debtors.

In 1869, the *Company*, and afterwards the *Society*, were ordered to be wound up. The indemnity of the *Company* having thus failed:—

Held, that the liquidator of the *Society* was not entitled, on the principle of lien for unpaid purchase-money, to have delivered back to him by the liquidators of the *Company* the lease, mortgages, and re-assurance policies which had been handed over to the *Company*:

Held, also, that the liquidator of the *Society* was not entitled, on any principle analogous to the right of a surety who discharges the debt of his principal, to the benefit of the re-assurance policies.

Doctrines of vendor's lien and principal and surety discussed.

THIS was a summons (dated the 27th of April, 1870), adjourned from Chambers, on behalf of the official liquidator of the *Western Life Assurance Society*, that the official liquidators of the *Albert Life Assurance Company* might be ordered to deliver up to the liquidator of the *Western* all the title-deeds and documents of title belonging to the *Western* or its trustees; and all policies of assurance effected by the *Western* with any other assurance society or company, and all securities for money belonging to the *Western* or the liquidator thereof, and all other unrealised assets handed by the *Western* to the *Albert*, and the documents relating thereto.

The questions were shortly these:—In 1845 the business and assets of the *Western* were transferred to the *Albert*. At that time the *Western* were possessed of a lease standing in the name of a trustee for them, and of some property which had been mortgaged to trustees for them to secure advances made by the society to the mortgagors. They held also a number of policies of re-assurance which they had effected with other companies to cover, in part, the amounts for which they were liable to their own policy-holders. All these were included in the general assets which they agreed to hand over to the *Albert*, and the *Albert* agreed to indemnify the *Western* shareholders against all claims on them. The documents were all handed over to the *Albert*, but the lease and mortgages had never been assigned, and were still standing in the names of the trustees. When the *Albert* came to be wound up, the indemnity became worthless, and the *Western* shareholders, becoming liable to those of their policy-holders who had not accepted the *Albert* as their debtors, claimed to be entitled beneficially to the lease, mortgages, and re-assurance policies.

The (admitted) facts and documents upon which the arguments turned were the following:—

The *Western Society* was constituted, under the name of the *Western, Manchester, and London Life Assurance Society*, in 1842.

By clauses 100 and 101 of their deed of settlement, dated the 1st of July, 1842, the directors were empowered to effect re-assurance policies.

On the 14th of June, 1865, an agreement was entered into between three directors of the *Western* of the one part, and three directors of the *Albert* of the other part.

The deed recited that "the board of directors of the said *Society* and *Company* respectively have resolved that an amalgamation of the said *Society* with, and transfer of its business and liabilities and assets to, the said *Company* is desirable, and it has been deemed expedient that a provisional agreement for such amalgamation and transfer should be entered into for the purpose of determining the terms upon which the said *Society* shall transfer its business and liabilities and assets to the said *Company*, if it be found that the said *Society* and *Company* have power to carry into effect such amalgamation and transfer, or can obtain such power

V.-C. J. 1870

In re Albert Life Assurance Company.

Ex parte Western Life Assurance Society.

without having recourse to Parliament; and that "the directors of the said *Society* in extraordinary board assembled, by a resolution dated the 13th day of June, 1865, have recommended the dissolution of the said *Society*, in order to carry into effect such amalgamation and transfer, in accordance with the deed of settlement of the said *Society*."

The deed then witnessed that it was thereby agreed and declared between the parties thereto, as follows:

1. "The directors of the said *Society* shall, as soon as practicable after the execution of this agreement, convene two extraordinary general meetings of the *Society*, in conformity with the provisions of the deed of settlement thereof, for the purpose of dissolving the said *Society*."

2. "Upon the confirmation by such second extraordinary general meeting of a resolution for dissolving the said *Society*, and in consideration of the transfer of funds and property to be made to them as next hereinafter is provided, the said *Company* shall pay and satisfy all claims and demands upon the said *Society* arising from assurances, annuities, and other contracts and engagements, when and as the times for the payment and satisfaction of the same successively arrive, and shall take upon itself all other the liabilities of every description of the said *Society*."

3. "In consideration of such undertaking as last aforesaid, and of the provisions hereinafter contained respecting the policies of the said *Society*, and the several other conditions herein contained, the said *Society* shall, as soon as is practicable after the passing of such second resolution, transfer to the said *Company* all the funds and property of the said *Society* of whatever kind they may be—good, bad, or doubtful—together with the right to receive all premiums that may become payable in respect of all the then existing policies, either issued by the said *Society* or the liabilities under which have been undertaken by the said *Society*, and all other amounts due and payable or to become due and payable to the said *Society;* it being agreed that the said *Company* shall take upon itself all risk and loss attending the realisation of the assets of the said *Society*." . . .

4. "The said *Company* shall give to all policy-holders in the said *Society*, whose policies are in existence at the period of its

dissolution, the same present and future facilities, privileges, and benefits in every respect, as if they had been effected with the said *Company*, and shall in every case when the said *Society* has entered into any special contract with the holder of any such policy, observe the same in like manner as the said *Society* would be bound to do if such dissolution had not taken place, except as to future bonus in respect of policies becoming claims before the 31st day of December, 1866."

6. "The books, accounts, papers, vouchers, and documents of the said *Society* shall be handed over to the said *Company*, who shall hold the same for the purpose of carrying on the business." . . .

7. "The agencies, connections, and goodwill of the said *Society* shall become the property of the said *Company*." . . .

18. "The board of directors of the said *Society* will, at the request and cost of the said *Company*, execute all deeds and do all acts that may be necessary, or that counsel may advise (except applying for a special Act of Parliament), for more effectually vesting in the said *Company* or its trustees all the funds and property, connections, agencies, and goodwill of the said *Society;* and the said *Company* will, at the request of the directors of the said *Society*, but at its own cost, execute all deeds, and do all acts that may be necessary, or that counsel may advise (except applying for a special Act of Parliament), for more effectually undertaking the liabilities of the said *Society*, and releasing the said *Society* therefrom."

At an extraordinary board meeting of directors, held on the 13th of June, 1865, it was resolved, first, that "it is desirable that the offer of another large life assurance company for the union of the business of this society with it be accepted;" and, secondly, that "in order to effect this union in accordance with the provisions of the deed of settlement, this board recommends the dissolution of this society;" and it was ordered accordingly.

Notice of the passing of these resolutions and summoning a meeting of shareholders was given, and at an extraordinary general meeting of the *Society*, held pursuant to the notice on the 29th of June, 1865, a resolution "that this *Society* be dissolved in accordance with the recommendation of the extraordinary board of directors held on the 13th of June, 1865," was carried by a

V.-C. J. 1870

In re Albert Life Assurance Company.

Ex parte Western Life Assurance Society.

large majority. At a second extraordinary meeting, held on the 14th of July following, the resolution was confirmed.

On the 17th of September, 1869, the *Albert Company* was ordered to be wound up, and the *Western Society* was ordered to be wound up on the 4th of December, 1869.

The documents of title sought to be recovered by this summons were the following:—

(*a*) A lease of a house in *Parliament Street, Westminster*, which belonged to the *Western Society* at the date of the agreement of the 14th of June, 1865, and was then vested in *Thomas Grissell* as a trustee for the *Western Society*.

(*b*) Divers mortgages for sums now amounting to £10,695 4*s*. 5*d*. or thereabouts, which at the date of the agreement formed part of the assets of the *Society*, and were vested in trustees or a trustee for it.

(*c*) Divers policies of assurance (called re-assurance policies) for sums amounting to £68,349 or thereabouts, which prior to the date of the agreement had been effected by the *Western*, or to the benefit of which it had become entitled, with other assurance companies, upon lives assured by the *Society*, or for the assurances upon which it had become liable, and which formed part of its assets.

The admissions (as amended) stated as follows:—

"In further pursuance of the said agreement, the said *Society* and its trustees paid and transferred to the *Albert Company* cash amounting to £14,000, and upwards, as well as divers sums of Consolidated and New £3 per Cent. Bank Annuities, and other Government funds, and certain *Canada* bonds, amounting in the whole to the value of £23,000, and upwards; and also handed over to the *Company* divers policies of re-assurance effected with other companies, and mortgage deeds, bonds, and other securities, and the title-deeds of certain leasehold premises belonging to the *Society*, and enabled the *Company* to receive balances in the hands of the said *Society's* agents, or then owing by the said agents, and such balances have been in fact received by the *Albert Company* to a considerable amount in the whole. The total amount actually received by the *Albert Company* from the assets of the *Western Society* (irrespective of premiums upon policies) is £65,000, and upwards."

"In further pursuance of the said agreement divers policies of the said *Society* which were in force at the date of the said agreement have been exchanged for policies of the said *Company*, and the said *Company* indorsed divers other policies of the *Society*, which were also in force at the date of the said agreement, and by such indorsement expressly accepted the liability upon such policies respectively."

"In further pursuance of the said agreement the said *Company* likewise indorsed certain policies or grants of annuity of the said *Society*, which were in force at the date of the said agreement, and by such indorsement expressly accepted the liability upon such annuity grants, or policies."

"In further pursuance of the said agreement the said *Company* has paid upon and in respect of policies of the said *Society* the sum of £150,000, and upwards, and in respect of annuity grants of the *Society* the sum of £11,000, and upwards."

"The said *Albert Company* has also received, in pursuance of the said agreement, the sum of £170,000, and upwards, for premiums upon policies effected with or transferred by the said *Society*."

"No further act or deed than as hereinbefore mentioned has ever been done or executed by or on behalf of the said *Society* for the purpose of vesting or transferring to the said *Company* any of the deeds or documents, or property or assets, of the said *Society* hereinbefore mentioned."

The form of the re-assurance policies is shewn by the following extract from one effected with the *Queen Company* for £1000, on the life of a policy-holder for £10,000 in the *Western*. After reciting that "*Arthur Scratchley*, as actuary and secretary to, for, and on behalf of the *Western* . . . *Society*, is desirous of effecting an assurance with the *Queen Insurance Company* in the sum of £1000 upon the life of" *A. B.* "of" (the *Western* policy-holder) . . . "and hath delivered into the office of the said company a certain proposal or statement in writing dated the 7th day of March, 1865, making reference to a proposal and other documents setting forth the age, past, present, and ordinary state of health of the said" *A. B*, "and which statement the said *Arthur Scratchley*, as actuary and secretary as aforesaid, thereby agreed should be the basis of his contract with the said company; now therefore these presents witness, and

V.-C. J.
1870
In re
ALBERT LIFE ASSURANCE COMPANY.
Ex parte
WESTERN LIFE ASSURANCE SOCIETY.

it is hereby declared by the said company, that in consideration of the said" *A. B.* "being now alive, and of the sum of £13 4*s.* 2*d.* paid by the said *Arthur Scratchley*, as actuary and secretary as aforesaid to the said company, and in case he shall on the 8th day of September, in the year 186—, and on the 8th days of March and September in every succeeding year, during the life of the said" *A. B.* "pay unto the said company the premiums of £13 4*s.* 2*d.*, the funds and property of the said company, according to the provisions of the deed of settlement thereof, shall be liable to the payment of the sum of £1000 to the said *Arthur Scratchley*, as actuary and secretary aforesaid, or to the successors in office or assigns of the said *Arthur Scratchley*, as aforesaid, within three calendar months after satisfactory proof shall have been received at the office of the said company of the death of the said" *A. B.* . . .

The policy contained other ordinary clauses, and was sealed with the company's seal, and signed by three directors.

As to the lease, it was stated at the Bar, that as the house had been required for a public improvement, the *Albert* liquidators, in order to get the purchase-money, wanted to obtain the concurrence of Mr. *Grissell*, the trustee of the *Western*, in the conveyance.

The summons came on to be heard before Vice-Chancellor *James* on the 15th of June.

Mr. *Eddis*, Q.C., and Mr. *Cracknall*, for the liquidator of the *Western* :—

As to the re-assurance policies. The word "amalgamation" is used in the resolutions of 1865, but, in fact, the arrangement was a sale of the assets and liabilities of the *Western* upon certain terms. No doubt the *Albert* were not bound to keep up the re-assurances, but probably they could not have sold them. The indemnity of the *Albert* having failed, the claim of the *Western* is in the nature of lien for unpaid purchase-money.

The VICE-CHANCELLOR :—Is it purchase-money? If I take an assignment of a lease I covenant to indemnify the assignor. If, then, I make a mortgage by way of underlease for all but one day of the term, would the assignor have a lien on the property in case of non-payment of rent or breach of covenant? You claim

a lien, not for unpaid purchase-money, but for some breach of the obligation.

Mr. *Eddis*:—In this case, the same event which would render us, the *Western*, liable to pay to our policy-holder, would render these other companies liable to pay to us. We transferred our liabilities to the *Albert*, but as to some of our policy-holders there was no novation. As to these policies, therefore, we are liable, but only secondarily. The *Albert* are primarily liable. If a surety is called upon to pay a sum which ought primarily to be paid by his principal, he is entitled to the benefit of all the securities in the possession of the principal at the time of the payment, though entered into since the contract and without the knowledge of the surety.

The VICE-CHANCELLOR:—How can there be the relation of principal and surety? If there was no novation, the policy-holder has no right against the *Albert*.

Mr. *Eddis*:—If not strictly a case of principal and surety, it is one of primary and secondary liability.

The VICE-CHANCELLOR:—Suppose a man offers to exchange a cheese for a horse, taking a warranty, and the horse turns out to be unsound, has he a lien on the cheese in priority to other creditors?

Mr. *Eddis*:—This is not a chattel. What we sold was a right to receive premiums, subject to payment of policies when they fall due, with a power to re-insure against those policies if and when paid. Had the *Albert* paid, they would have had a right to the re-assurances. We have had to pay; hence we claim a right to keep our own securities.

As to the leaseholds and mortgages, we claim them on a principle analogous to that of vendors' lien.

The VICE-CHANCELLOR:—It is rather an equitable stoppage *in transitu*.

Mr. *Eddis*:—Undoubtedly. The principle of vendors' lien is, that where the consideration consists of money, or bond, or a covenant to pay a fixed amount, the lien exists. But where the consideration

V.-C. J. 1870

In re Albert Life Assurance Company.

Ex parte Western Life Assurance Society.

is the payment of a rent-charge, the lien is excluded, because it cannot be supposed to have been the intention to lock up the property for an indefinite period: *Earl of Jersey* v. *Briton Ferry Floating Dock Company* (1). Here something was left to be done. The *Albert* liquidators call upon our trustee to convey to them. All we say is, We are entitled to have matters left in *statu quo* till you fulfil your obligations: *Dixon* v. *Gayfere* (2); *In re Langmead's Trusts* (3), which was varied on appeal in one point of construction only (4); *Collins* v. *Collins* (5).

Mr. *Cracknall*:—These were both companies under the old Joint Stock Companies Acts—merely large partnerships, not corporations; hence their securities were taken in the names of trustees for them. The parties to this agreement were directors; and it is plain that something more was contemplated to be done. As to the lease, can it be said that the *Albert* liquidator can file a bill for specific performance against the *Western Society* and Mr. *Grissell*, their trustee? He would be told he must perform his part of the contract. Would the Court, if the money were paid in under the *Lands Clauses Act*, pay the money to the *Albert*, and order the *Western* and their trustee to join in conveying the property?

As to the mortgages, they stand in the same position. They can only be recovered by proceedings in the names of trustees for the *Western*.

In the case of the re-assurances, what the *Albert* liquidators claim is, that they may put the whole of these re-assurance policy moneys into their pockets, leaving us to pay the whole of the original policy. As regards us and our policy-holders, we may be the principal debtors; but as between us and the *Albert*, the *Albert* are the principals and we are the sureties, and if the *Albert* does not pay, we must. Then we have a right to the securities.

The Vice-Chancellor:—If a surety, to secure himself, insures the life of the debtor at his own risk and for his own benefit, he paying the premiums, can a co-surety compel the first surety to deliver up that policy?

Mr. *Cracknall*:—As between co-sureties, perhaps that could not

(1) Law Rep. 7 Eq. 409.
(2) 1 De G. & J. 655.
(3) 20 Beav. 20, 26.
(4) 7 D. M. & G. 353.
(5) 31 Beav. 346.

be done. But where a surety is compelled to pay the debt of a principal, the Court will not allow the principal to take the benefit of securities which the surety himself has created for his own protection. If *A.*, having a life estate, mortgages it, and *B.*, as surety, mortgages some property to secure the same debt, and then *C.*, the mortgagee, for his own safety, insures *A.'s* life, it follows from established principles that *B.*, if he has to pay *C.*, is entitled to *C.'s* policy.

By the 5th section of the *Mercantile Law Amendment Act*, 1856 (19 & 20 Vict. c. 97), a surety who discharges the liability is entitled to an assignment of all securities held by the creditor: *Newton* v. *Chorlton* (1).

On the 23rd of June the summons was ordered by Vice-Chancellor *James* to stand over for further admissions, and on the 22nd of July it came on again with amended admissions before Vice-Chancellor *Bacon;* and the arguments were continued on the 2nd of August and the 11th and 12th of November.

Mr. *Eddis*, Q.C., and Mr. *Cracknall*, in continuation:—

The question is, are the *Albert* to be in a better position because they have not discharged their obligation to us? *Yonge* v. *Reynell* (2).

The *Albert*, no doubt, have gone on paying premiums on the re-assurance policies, but then they have been receiving the premiums on the policies to secure which the re-assurances were made.

We say, then, first, we have a general lien; secondly, the Court will take no step to compel our trustee to assign the lease and mortgages to a wrongdoer, but will order the lease, the mortgage deeds, and the re-assurance policies to be handed back to us: *Matthew* v. *Bowler* (3).

Why should not the doctrine of stoppage *in transitu*, which originally was an equitable right (*Lickbarrow* v. *Mason* (4)), apply to this case?

(1) 10 Hare, 646.
(2) 9 Ibid. 809, 818.
(3) 6 Hare, 110.
(4) 1 Sm. L. C. 699, 737.

V.-C. B. 1870 *In re* Albert Life Assurance Company. *Ex parte* Western Life Assurance Society.

The result of the *Albert* contention will be, that they having already received out of the amalgamation a surplus of £55,000, are to be entitled to throw this sum into the bottomless gulf of their insolvency.

Mr. *Kay*, Q.C., and Mr. *Higgins*, for the liquidators of the *Albert*:—

The contention is, that the *Western* are entitled to withdraw from the funds of the united company a considerable portion of the assets, and to treat those assets as if they had been hypothecated with them to meet a certain liability. But the question of lien must depend upon the nature of the transaction taken as a whole. These were insurance companies, the whole funds of which were liable *pari passu*, and without priority one over another, to the claims of the policy-holders. No member was liable beyond his stake; yet the policy-holder might get a receiver. The *Western*, then, knew, and the *Albert* knew, that with every fresh policy they issued they were going on pledging the whole of their respective funds. Then, by the agreement, the *Western* policy-holder got a power of effecting a policy with the united company if he pleased. Instead of his original *Western* fund, he might take the security of the joint fund, including the assets which the *Western* agreed to hand over. This many of the *Western* policy-holders did. How, as against them, can these assets be withdrawn from the joint fund? Nothing was said in the agreement about a lien, or about giving the *Western* shareholders a primary charge upon these assets. In *Collins* v. *Collins* (1) the thing sold was a simple debt.

Then it was observed, that we must come to this Court for its assistance. We do not want specific performance; we say that the *Western* trustees, directly they had notice, became trustees for us. It is the *Western* who, after the instruments have been handed over to us, bring us here, by this summons, to get them back.

As to the re-assurance policies, the *Western* do not claim them generally, but they claim each severally, as incidental to each original policy of theirs. But it was quite a matter of speculation whether they would be of any value or not; and it is by our outlay

(1) 31 Beav. 346.

V.-C. B.
1870
In re ALBERT LIFE ASSURANCE COMPANY. *Ex parte* WESTERN LIFE ASSURANCE SOCIETY.

that they have either become or continued to be valuable. We were not bound to keep them up.

If the *Western* have the lien of a vendor, it must be on every part of the assets. The *Western* do not and cannot say that they have any lien to the extent of those policy-holders who accepted the united company as their debtors—only as to those who refused to make a novation.

But this is not a claim for purchase-money at all; it is only a claim in respect of damages for breach of a collateral contract. As the Lord Justice observed, if a lessor sues a lessee after assignment, there is no lien; if a man exchanges a chattel for a warranted horse, and the warranty fails, he has no lien.

Dixon v. *Gayfere* (1) shews that in such a case as this the question of lien or no lien must be one of intention. There is nothing in the agreement about lien, and it would be contrary to the intention, inasmuch as there is no priority amongst policy-holders, who are entitled to a receiver only to prevent waste of assets: *In re State Fire Insurance Company* (2); *Kearns* v. *Leaf* (3).

The *Western* had power to do what they actually did—namely, hand over policies in which all the assets of the united company would be bound, subject to the appointment of a receiver. Could the Court, by mere implication of a contract, have followed specific portions of the property into the coffers of the united company? Nothing was said about distinguishing one class of the assets from another.

The true construction of the agreement is, that it was not a sale and purchase, but a complete fusion or merging of one company in the other.

The *obiter dictum* of the Master of the Rolls in *In re Langmead's Trusts* (4) was not followed on the appeal (5).

As to the re-assurance policies, vendor's lien cannot apply, for the contention is—if you, the *Albert*, do not pay that particular policy, we, the *Western*, claim the re-assurance; if you do pay, we make no claim.

The answer to the argument founded on principal and surety

(1) 1 De G. & J. 655. (3) 1 H. & M. 681.
(2) 1 D. J. & S. 634. (4) 29 Beav. 20.
(5) 7 D. M. & G. 353.

V.C. B. 1870

In re Albert Life Assurance Company.

Ex parte Western Life Assurance Society.

is, that the *Western* was not a surety in respect of these policies. A surety is one of two persons both of whom are answerable for the debt. Here, the *Western* only is liable. The term "surety" is entirely misapplied. What the amalgamated society said was —as between us and the policy-holders we undertake to pay them; as between us and you, the *Western*, we undertake to indemnify you. An indemnified person is not a surety.

Again, the re-assurance policy never was a security to the original policy-holder. If the *Western* privately intended out of this particular fund, to pay a certain debt, and then handed the property over, that does not bind it in the hands of strangers. It was never charged in favour of the original creditor; never earmarked.

Moreover, the surety has a right when, and only when, he has paid the debt of the principal.

As to the documents outstanding in the names of trustees, it may be admitted that there has been no express declaration of trust for the united company by the trustee. But he was cognisant of the whole; and the united company has had the benefit of the whole.

The claim is put forward not on behalf of creditors, but of shareholders of the *Western*. But the creditors of the united company are not to be deprived of this property for the sake of the shareholders of the *Western*.

[*McIvor's Claim* (1) was also cited.]

Mr. *Eddis*, in reply, referred to *Hughes* v. *Kearney* (2).

Sir James Bacon, V.C., after stating the facts of the case, continued:—

For the liquidator of the *Western Society* the case has been argued on two grounds; first, that the failure of the *Albert* to perform the undertaking to indemnify the *Western Company* against its liabilities and engagements, which was the true consideration for the agreement, has entitled the latter company to have retransferred to them so much of the property and assets once theirs as still remain unrealised and unconverted. In support of this

(1) Law Rep. 5 Ch. 424. (2) 1 Sch. & Lef. 132.

claim it has been argued that the *Western Company* have such a lien and the like rights as a vendor would have against a purchaser who had failed to pay the price of a thing sold. And secondly, that by the effect of the transaction between the parties, the *Western Company* who, in the first instance, were primarily liable to the persons having claims upon them, have become, by means of the transfer of their property and the promised indemnity of the *Albert*, only liable in the second degree as between themselves and the *Albert*—that they have become, in fact, only sureties for the performance of their original obligations; and that, therefore, upon the well established law as between principal and surety, they are entitled to the benefit of all the securities in the hands of the *Albert*, whom they call the principal debtor.

But I conceive that it is impossible to maintain this latter contention. The very statement of it proceeds upon what seems to me to be a fallacy. The *Albert*, by the contract, undertake to indemnify the *Western* against the enforcement of claims which creditors of the *Western* may make against the *Western*. If they fail to perform this contract, they are liable for such consequences as may ensue upon the breach of contract; but they do not by any means thereby become the principal debtors of such creditors.

If the creditors, by contract or by conduct which implies a contract, have substituted the *Albert* for the *Western*, the latter are thereby released from their original obligations, and no question arises, as between the two companies, upon the engagement to indemnify. If the creditors have not adopted the *Albert*, or substituted them for the *Western*, their original debtors, the first contract remains in its full force. And it is in those cases only in which the creditors retain their original rights against the *Western* that any question arises between the two companies. The creditors have not, by contract or by implication, two debtors; and it is only in cases where there are two or more debtors that the well-established rule can prevail by which one of two debtors, who pays the debt for which both are liable, can claim the benefit of securities or assets which the creditor might claim the benefit of. In this case, the assets transferred to the *Albert* are in no sense the property of, or liable to, the creditors. I am therefore of opinion that, even if upon any ground the *Western* could be properly called sureties

V.-C. B. 1870 *In re* Albert Life Assurance Company. *Ex parte* Western Life Assurance Society.

for the performance of any contract with the creditors—as I think they were not—yet as the assets in question were not and are not available to the creditors, the *Western*, even if they had paid the creditors in full, would not be entitled, upon the ground alleged, to have transferred to them the assets which they had assigned to the *Albert*.

It remains to be considered whether upon the other ground stated by the claimants — namely, the lien which an unpaid purchaser has upon the thing sold — the right alleged by the *Western* can be supported. I think that in determining this question nothing turns upon the fact that such part of the property assigned as now remains *in specie* and unrealised is of various kinds. It consists of a leasehold held by a trustee, and of certain mortgages taken in the names of trustees for the *Western*, and still held by such trustees, and of re-assurances effected originally by the *Western* for the purpose of diminishing the amount of the risk incurred by them in respect of policies originally granted by them —which re-assurances have been kept on foot by the *Albert*, and are still open or current, but in respect of which the premiums paid by the *Albert* have been, as they must necessarily have been, less in amount than the sums which they have received in respect of the policies originally granted by the *Western*, and which have been continued by the *Albert*. Inasmuch, however, as the assignment and transfer by the *Albert* was of the assets *en masse*, and without reservation or distinction, I think that the rule applicable to the entirety of the subject of the assignment cannot be affected or qualified by any consideration especially relating to portions of the entirety so assigned.

Now, although the rule of law upon which the doctrine of an unpaid vendor's lien depends must be very frequently influenced by the particular circumstances of each case in which it is said to arise, there is one plain principle which guides and governs its application in all cases. If it be expressed, or can be safely and properly inferred from documentary or other evidence, or from the nature of the contract, that it was the intention of the parties that the sale or transfer, however absolute in its terms, was subject to the condition that the purchase-money should be paid, or that the thing contracted to be done by the vendee should be performed,

the lien will prevail. If, on the other hand, no such inference can be properly drawn—if the performance of the thing contracted to be done by the vendee was not the condition upon which the transfer was made, but the engagement to do the thing was the consideration for the transfer, the vendor, having accepted that engagement, has the very thing he bargained for, and cannot say that the consideration has not passed to him. In such cases the lien cannot prevail. The rule I have mentioned and its application cannot be more pointedly illustrated nor more clearly expressed than in the judgment of Lord *Cranworth* in *Dixon* v. *Gayfere* (1).

The same principle is established by the cases of *Parrott* v. *Sweetland* (2), and *Clarke* v. *Royle* (3); and Lord *St. Leonards* (4), in commenting on the latter case, says: "There is a marked distinction between a conveyance as for money paid, with a separate security for the price, whether by covenant, bond, or note, and a conveyance expressed to be in consideration of covenants which the purchaser enters into by the deed itself."

If, then, the intention of the parties to this instrument be considered, it seems impossible to infer that, consistently with that intention, any such lien as the *Western Society* contends for could have been contemplated. The intention expressed in the agreement is, that "an amalgamation of the *Western Society* and a transfer of its business and liabilities and assets to the *Albert Company*" should be effected. That is, as I read it, that the business and dealings of the amalgamated company shall, for the future, be carried on in the same manner and by the same means as those of each society had been theretofore carried on separately; that the assets of both should form a common stock, subject to all the existing liabilities and debts of both companies, and to all such as should thereafter be contracted by the *Albert Company*. To hold that there should be any distinction between any of the articles of which this common stock consisted would frustrate the very object of the arrangement—and it may, I think, be also properly observed that, if it had been so intended, nothing would have been more obvious and simple than to preserve and secure such distinction by declaring

(1) 1 De G. & J. 655. (3) 3 Sim. 499.
(2) 3 My. & K. 655. (4) Vend. & Pur. 673.

V.-C. B. 1870 *In re* Albert Life Assurance Company *Ex parte* Western Life Assurance Society.

trusts to that effect—of which the document referred to contains no trace. Then the terms in which the transfer is made are as explicit as the intention is plain. They are, that "in consideration of the transfer of the funds and property of the *Western Society*, the *Albert Company* shall pay and satisfy all claims and demands upon the said society when and as the same shall successively arise, and shall take upon itself all other the liabilities of every description of the said society."

It appears to me, therefore, clear, upon the principles I have adverted to, that the claim of the *Western Company* cannot be sustained; for it is impossible to infer from the nature of the transaction that it was the intention of the parties that any lien upon the assets transferred should exist; and, further, by the very terms of the contract, not only is such an inference excluded, but the true construction of the contract is, that the consideration for which the transfer was made was not the payment of any price, nor was it a condition of the transfer that the engagement of the *Albert Company* should be performed, but the consideration was simply and solely the agreement that the company should take upon itself the debts and engagements of the *Western Society*, and all the risk and loss which might attend the realisation of the assets transferred.

For these reasons I dismiss the application of the official liquidator of the *Western Society*.

[It was arranged that the liquidators of each company should take their costs out of their own funds respectively.]

Solicitor for the *Western* Liquidator: Mr. *W. T. Manning.*

Solicitors for the *Albert* Liquidators: Messrs. *Lewis, Munns, Nunn, & Longden.*

TWYNAM *v.* PORTER.

V.-C. B.
1870
Nov. 9, 24.

Solicitor and Client—Charge upon Property recovered or preserved—Receiver—23 & 24 Vict. c. 127, *s.* 28.

In a suit by a *cestui que trust* against a trustee of landed estate, praying for an account and reconveyance, a receiver was ordered to be, and afterwards was, appointed, adversely to the Defendant. Notice of motion for decree was served, but before the time for closing evidence had arrived, the Plaintiff, without consulting her solicitor, and without his knowledge, entered into an agreement with the Defendant for a compromise of the suit on the terms, first, that a sum of cash should be paid to the Plaintiff, then that the mortgages on the property should be paid off, and then that the costs of all parties estimated at a fixed sum should be paid. Upon hearing of the compromise, the Plaintiff's solicitor applied to the Plaintiff and to the Defendant's solicitors for the terms of it, but was refused all information. Upon Petition under the *Solicitors Act* :—

Held, that the solicitor was entitled to a first charge for the amount of his taxed costs, as between solicitor and client, upon the property of the Plaintiff, as having been recovered and preserved through his instrumentality.

Followed. WIMBOURNE *v.* FINE [1952] 1 Ch. 869

THIS was a Petition in the suit of *Twynam* v. *Porter*, and in the matter of the *Solicitors Act* (23 & 24 Vict. c. 127), by *Henry Walker*, *Augustus Samuel Twyford*, and *Henry Richard Moyse Belward*, solicitors, praying for a declaration that the Petitioners were entitled to a charge upon, and a right to payment out of, the shares and interests of the Plaintiff *Ann Caroline Allardice* (formerly *Twynam*), and the Defendant *Edward Twynam* respectively, of and in the hereditaments and premises at *Winchester*, in the Petition mentioned, or any other the property recovered by or preserved for them respectively in the suit, for their taxed costs, charges, and expenses of and in reference to the suit, as the solicitors of the Plaintiff and the same Defendant respectively; that the amount of such costs might be raised by a sale of the shares and paid to the Petitioners; and that, in the meantime, the receiver appointed in the suit might be continued, at least as far as regarded the shares and interests of the Plaintiff and Defendant *Edward Twynam* respectively in the same hereditaments.

From the statements in the Petition the following facts appeared:—

Edward Twynam, *John Twynam*, *Emily*, wife of *George Twynam*

V.-C. B. 1870 TWYNAM v. PORTER.

Porter, and *Ann Caroline Twynam*, spinster, were entitled, under the wills of their father and brother, as tenants in common in fee (subject to mortgages), to freehold hereditaments at *Winchester*, and to copyhold hereditaments at *Fishers Pond*, near *Winchester*; also as tenants in common to leaseholds at *Fishers Pond*, renewable on lives.

On the 20th of June, 1856, *Edward Twynam*, being then and still resident in *Australia*, executed an indenture conveying to his brother-in-law, *G. T. Porter*, all his shares and interest in the premises upon trusts for sale and management, with power of revocation. In 1857 *John Twynam* emigrated to *Australia*, having also previously executed to *Porter* a similar conveyance of his shares and interest upon like trusts.

Upon the emigration of *Edward Twynam*, *Porter* also undertook the management of the affairs of his sister-in-law, *Ann C. Twynam*, then an infant; and acting under the above-mentioned instruments, and on behalf of *Ann C. Twynam*, and of his wife, *Porter* entered upon the sole management and superintendence of the hereditaments and premises, and into receipt of the rents and profits.

In 1857 *Porter* purchased out of his own moneys the reversion of the leaseholds at *Fishers Pond*.

On the 4th of March, 1858, *Ann C. Twynam* attained twenty-one, and in June of that year she handed to *Porter* sums amounting to £642 out of her own moneys, in order to pay off a mortgage of £700 on the copyholds, and have a transfer of the same to her for her own benefit, it being arranged that the residue of the required amount should be advanced out of moneys belonging to *Edward Twynam*, then in the hands of *Porter*. Of the £642 *Porter* applied only £300 in paying off the mortgages, retaining the balance in his hands.

On the 21st of November, 1861, *Ann C. Twynam*, being about to go and reside with her brothers in *Australia*, executed, at *Porter's* request, a deed of conveyance to him similar to those executed by her brothers, with like power of revocation, of her shares and interest in the property, upon trusts for sale and management.

During *Ann C. Twynam's* residence in *Australia*, *Porter* remitted to her various sums, but rendered no account. On the 29th of July, 1864, *Porter* took a transfer of the £700 mortgage to himself.

V.-C. B. 1870 TWYNAM v. PORTER.

In 1866 *Ann C. Twynam* returned to *England;* and on application to *Porter* obtained from him some accounts, with which she was dissatisfied. In May, 1867, *John Twynam* died, having by will devised all his real and personal estate to *Ann C. Twynam* and *Edward Twynam,* as tenants in common.

On the 9th of May, 1868, *Ann C. Twynam,* by deed-poll, revoked the deed of conveyance to *Porter.* He, however, refused to give effect to this deed of revocation, alleging that he had certain claims against the property for advances and for expenses incurred by him.

On the 15th of June, 1868, *Ann C. Twynam* (the Petitioners acting as her solicitors) filed the bill against *Porter,* for an account; for a declaration that the trusts of the deed of the 21st of November, 1861, had been effectually revoked, and for the delivery up of the indenture to the Plaintiff, and, if necessary, for a reconveyance to her; for a declaration that the Defendant was a trustee of the mortgage for the Plaintiff; for payment of what should be found due; for an injunction, and a receiver.

Subsequently the bill was amended by adding *Emily Porter* and *Edward Twynam* as Defendants; and, as amended, prayed for a declaration that the purchase of the reversion of the leaseholds at *Fishers Pond* by *Porter* was made for the benefit of the persons beneficially entitled thereto.

In December, 1868, the Defendant *Edward Twynam* revoked his deed of conveyance, and gave a power of attorney to act for him to the Plaintiff and the Petitioners.

On the 8th of May, 1869, upon motion on behalf of the Plaintiff, it was ordered that a receiver be appointed of the freehold and leasehold premises at *Winchester* and *Fishers Pond;* and by another order, dated the 22nd of June, 1869, *Banister Fletcher* was appointed such receiver; and by a third order, dated the 7th of July, 1869, it was ordered that the receiver should be at liberty to apply the rents and profits in keeping down the interest on the mortgages.

Emily Porter died in August, 1869; and the suit was revived. Subsequently the bill was re-amended, by seeking to make the Defendant *Porter* chargeable with wilful neglect and default; and notice of motion for decree was served on the Defendant *Porter* on the 16th of May, 1870.

V.-C. B. 1870 TWYNAM v. PORTER.

Throughout the proceedings in the suit the Petitioners acted as the Plaintiff's solicitors, and since *Edward Twynam* was made a Defendant they had acted as his solicitors.

Before the time for taking evidence had closed, the Plaintiff, without consulting the Petitioners, and without their knowledge, had a meeting with the Defendant *Porter*, and thereupon, without consulting them or informing them of her intention, entered into an agreement with the Defendant *Porter* for the compromise of the suit. The first intimation of this compromise was by a letter, dated the 17th of May, 1870, from the Plaintiff to the Petitioner *Walker*, as follows: "I have signed an agreement for making full provision for the payment of your costs in this suit; be so good as to stay all further proceedings."

The Petitioners wrote to the Plaintiff, and applied to the Defendant *Porter's* solicitors, Messrs. *Vizard, Crowder, & Co.*, to obtain the terms of the compromise, but to the letters no answer was returned, and the Defendant's solicitors refused to give the information.

On the 1st of June, 1870, the Plaintiff married the Rev. *Harry James Allardice.*

On the 13th of June, 1870, an application was made on behalf of the Defendant *Porter* to discharge the receiver; and the summons was ordered to stand over generally.

The Defendant *Porter* had caused the property to be advertised for sale.

On the 24th of June, 1870, the Plaintiff obtained an order to change her solicitors, and Messrs. *Vizard, Crowder, & Co.* were appointed her solicitors.

This Petition was then presented.

From the evidence of the Respondents, in opposition to the Petition, it appeared that the terms of the compromise, which was signed on the 17th of May, 1870, were substantially as follows: That an immediate stay of all proceedings in the suit, including the discharge of the receiver, should be consented to by all parties; that proceedings for effecting a sale of the property should be at once commenced and carried out; that the proceeds of the sale should be applied in payment of, 1, the expenses of the sale; 2, £500 to the Plaintiff out of the proceeds of the *Fishers Pond* estate;

3, the mortgages on the *Winchester* estate; 4, other mortgages on the *Winchester* and *Fishers Pond* estates; 5, the costs of all parties of the suit, estimated at £350; and the residue as therein mentioned; and that in the event of proceedings being taken against the Plaintiff for her costs of the suit, the Defendant *Porter* should raise and pay the same by the creation of a first charge on the *Fishers Pond* property (of the first mortgage on which he was assignee); and that any costs which should be paid out of the £500 should be recouped to the Plaintiff out of the £350 agreed to be paid for the costs of the suit.

This agreement was afterwards embodied in a deed, dated the 30th of May, 1870, and made between the Plaintiff of the first part, the Rev. *Harry James Allardice* of the second part, and the Defendant *Porter* of the third part; and by a deed, dated the 31st of May, 1870, being the marriage settlement of Mr. and Mrs. *Allardice*, the share and interest of the Plaintiff in the proceeds of the sale, to be effected in accordance with the terms of the compromise, were settled upon the trusts therein mentioned.

Mr. *Kay*, Q.C., and Mr. *E. Thurstan Holland*, for the Petitioners:—

The intention of the parties was to exhaust the estate, to postpone payment of the Petitioners, and to fix an amount for payment of the costs.

This is a case clearly within the Act. Mr. *Walker* was regularly retained, on no special terms, was instructed, and has paid sums out of pocket. By means of the order for appointment of a receiver, followed by the order appointing him, the property has been "recovered or preserved through the instrumentality of" the Petitioners, within the meaning of the 28th section of the statute. The Defendant's control of the estate was thereby put an end to, and the Plaintiff obtained a great advantage in arranging the terms of the compromise: *White* v. *Pearce* (1); *Bailey* v. *Birchall* (2), *Scholefield* v. *Lockwood* (3); *Davis* v. *Lowndes* (4); *Shaw* v. *Neale* (5).

(1) 7 Hare, 276.
(2) 2 H. & M. 371.
(3) Law Rep. 7 Eq. 83.
(4) 3 C. B. 808, 823.
(5) 6 H. L. C. 581, 601.

V.-C. B. 1870 TWYNAM v. PORTER.

Mr. *Fry*, Q.C., and Mr. *Kekewich*, for the Plaintiffs, Mrs. *Allardice* and her husband:—

The property being the subject of a compromise not shewn to have been fraudulent, there is no existing fund on which the lien can attach: *In re Sullivan* v. *Pearson* (1).

The Petitioners do not impeach the compromise, thereby admitting their inability to disturb it, but they make a claim which indirectly assails it. Either they must go the length of asking the Court to treat it as wholly null and void, or they must submit to its terms. They cannot approbate and reprobate.

This property has not been "recovered" at all; still less "through the instrumentality of" the Petitioners. The effect of the appointment of a receiver has been simply to keep down the interest on the mortgages; and the compromise was effected without the aid of the Petitioners.

In *White* v. *Pearce* (2), which was before the Act, the fund had been actually recovered. In *Bailey* v. *Birchall* (3), the suit in which the receiver was appointed was a mere *interim* bill, and the receiver was appointed by consent of all parties.

The result of the order will be to impede the sale, which would be for the benefit of all parties, and to give a lien on property which belongs to other persons than the Petitioners' clients: *Berrie* v. *Howitt* (4).

Mr. *Methold*, for the trustees of Mr. and Mrs. *Allardice's* settlement.

The Defendant *Edward Twynam*, who was out of the jurisdiction, did not appear. An order for substituted service of the Petition on the Plaintiff was obtained on the 3rd of July.

SIR JAMES BACON, V.C.:—

It seems to me that the Petitioners are entitled to the order they ask.

[His Honour stated the principal allegations and the prayer of the bill; and the facts of the order for, and of the appointment of a receiver, and continued:—]

(1) Law Rep. 4 Q. B. 153.
(2) 7 Hare, 276.
(3) 2 H. & M. 371.
(4) Law Rep. 9 Eq. 1.

Now, it has been suggested that nothing is protected or preserved by these proceedings, excepting only the £500, which is mentioned in the compromise. The rest of the Petition I do not stop at present to dwell upon, because all that took place in connection with the compromise, and all that is to be done in consequence of the compromise, is, in my opinion, subject to the claim of the Petitioners under the statute.

I think by the appointment of a receiver in this suit, the object of which was to recover possession of the estate which had been intrusted to *Porter*, that property was effectually preserved; and it came clearly within the provisions of the Act. If that be so, it cannot signify in the slightest degree what the terms of the compromise were. Whether they were binding on the parties is wholly unimportant, because the right of the Petitioners to have, out of the property protected and preserved, payment of the costs which have been incurred for the benefit of the Plaintiff is a claim paramount to any title which can be asserted under the compromise, whatever it may be.

The same observation is to be applied to the trustees of the settlement.

I do not think the Petitioners are obliged to run any risk as to the result of the sale to be effected under the compromise. I think, in the words of the statute, as they are embodied in the prayer of the Petition, they are entitled to an order for taxation of their costs; and they are entitled to an order that the amount of their costs shall be raised out of the share of the Plaintiff in the suit, and out of the share of *Edward Twynam* also. *Edward Twynam* is served with the Petition; whether he appears or not, as service is proved, does not signify.

Mr. *Kay*:—The order will follow the form given in *Seton* on Decrees (1).

The VICE-CHANCELLOR:—Yes; there will be a declaration and order as prayed; the costs of the Petitioners to be taxed as between solicitor and client, and the Petitioners to have their costs of the Petition.

(1) Page 858.

V.-C. B.
1870
TWYNAM
v.
PORTER.

The following are minutes of the Order :—

Declare that the Petitioners are entitled to a charge upon the shares and interests of each of them, the Plaintiff and the Defendant *Edward Twynam* respectively, of and in the hereditaments and premises at *Winchester* and *Fishers Pond* in the Petition mentioned, or any other property recovered by or preserved for them respectively in the said suit, for the taxed costs, charges, and expenses of the Petitioners of and in reference to such suit as the solicitors of the Plaintiff and Defendant respectively.

Refer it to the Taxing Master to tax such costs as between solicitor and client, including therein the costs, charges, and expenses of the Petitioners of and in reference to the said suit (including the costs of the Petitioners of and relating to this application).

Order that the amount of such taxed costs, and costs, charges, and expenses found due to the Petitioners, as the solicitors of the Plaintiff, be raised by a sale, with the approbation of the Judge, of her share and interest in the said hereditaments and premises, or other such property as aforesaid, and be paid to the Petitioners (naming them); and that the amount of such taxed costs, and costs, charges, and expenses found due to the Petitioners as the solicitors of the Defendant *Edward Twynam* be raised by a sale, with the approbation of the Judge, of his shares and interest in the said hereditaments and premises, or other such property as aforesaid, and be paid to the Petitioners (naming them).

Receiver to be continued.

Liberty to apply.

Solicitors for the Petitioners: Messrs. *Walker, Twyford, & Belward.*

Solicitors for the Respondents: Messrs. *Vizard & Co.*; Messrs. *Pyke, Irving, & Pyke.*

V.-C. B.
1870
July 20, 28;
Nov. 15.

LLYNVI COMPANY v. BROGDEN.

Adjoining Coal Mines—Wrongful Working—Mode of taking Account—Form of Decree.

Where a mine-owner had passed his boundary, and taken coals from his neighbour's mine :—

Held, that he was liable to account for the value of the coals at the pit's mouth, with just allowances for the cost of raising, but not of getting or severing.

Form of decree.

THIS was a bill by the *Llynvi Coal and Iron Company, Limited*, against Defendants, named *Brogden*, who were owners of a mine adjoining a mine of the Plaintiffs, stating that a seam of coal lay beneath both mines, and complaining that the Defendants, in work-

ing that portion of the seam which lay beneath their mine, had extended their workings so as to pass the boundary of their property, and encroach upon the Plaintiffs' portion of the seam, and that they had raised coal belonging to the Plaintiffs to a large extent without the license or authority of the Plaintiffs or their agents.

After referring to two agreements which had subsisted between the Plaintiffs and the Defendants relating to the working of certain neighbouring coal-fields, the bill prayed for an account of all coals and other minerals worked by the Defendants from under the Plaintiffs' mine, and of all the coal which the Defendants had rendered unworkable, and of the value of such coal, without any allowance for the cost of working, and that the Defendants might be decreed to pay to the Plaintiffs the amount of such value; and, further, that the amount of the damage sustained by the Plaintiffs by reason of the Defendants having broken through the boundary might be ascertained, and that the Defendants might be decreed to pay the amount of such damage to the Plaintiffs.

The Defendants, by their answer, admitted the encroachment, and that they had raised coal of the Plaintiffs to the extent of 3706 tons; but stated an agreement, the result of which they contended to be that they had obtained the Plaintiffs' leave and license; and if not, said that the encroachment had been made in ignorance, and that they had done no wilful injury to the Plaintiffs.

The results of the evidence on these points, as found by the Court, are stated in the judgment, and the case is of general importance only as regards the form of the decree.

Sir *Roundell Palmer*, Q.C., Mr. *Grove*, Q.C., and Mr. *Davey*, for the Plaintiffs.

Mr. *Kay*, Q.C., Mr. *Henry James*, Q.C., and Mr. *Tahourdin*, for the Defendants.

SIR JAMES BACON, V.C., after reviewing the pleadings and evidence at length, came to the conclusions not only that the agreement alleged by the Defendants to have been made never was made, but that such an agreement was never authorized by the Plaintiffs to be

V.-C. B. 1870 LLYNVI COMPANY v. BROGDEN.

made by any agent of theirs; and that by no subsequent act of the Plaintiffs had the want of such original authority been supplied; hence that the Defendants' working in the Plaintiffs' mine had been wholly unauthorized and unlawful. [His Honour continued:—]

Both parties have gone into evidence as to the amount of damage which the Plaintiffs have sustained in consequence of the manner in which the Defendants have worked and left the Plaintiffs' mine. Upon this subject, also, the evidence is in direct conflict. It is one upon which the Court can come to no satisfactory conclusion upon the materials before it. I think, however, that the Plaintiffs have established a right to an inquiry, if they insist on it, as to the damage they allege they have sustained on this head. They must, however, take this inquiry, subject to what may be the consequence if they should fail in proving damages. On the other hand, if they should succeed, they will be entitled to be paid by the Defendants the amount of such damages.

The principles upon which an account is directed in cases like the present have been not unfrequently considered in Courts of Law as well as in Courts of Equity, and are established by authority. In *Martin* v. *Porter* (1), which was referred to in the course of the argument, by the unanimous judgment of the Court of Exchequer it was decided that the coals which had been severed by the Defendant were chattels belonging to the Plaintiff, and that the Defendant was liable to pay the amount of their value, without any allowance for the expense of severing them—such severance being a wrongful act for which the Defendant could not claim to be reimbursed.

In *Wood* v. *Morewood* (2), Mr. Baron *Parke* directed the jury to assess the damages at the value of the coals at the time when they became the chattels of the Plaintiff, or at the value of the coals as if the coal-field in which they were contained had been purchased by the Defendant of the Plaintiff, according to the view they might take of the Defendant's conduct in getting the coals.

In *Morgan* v. *Powell* (3) the Defendant was allowed the cost incurred by him in bringing the coals to the pit's mouth on the express ground that such cost must have been incurred by the Plaintiff for the same purposes.

(1) 5 M. & W. 351. (2) 3 Q. B. 440, n.
(3) 3 Q. B. 278.

The judgment of the Lord Chancellor in *Powell* v. *Aiken* (1) is to the like effect; for by his decree he directed an inquiry to ascertain the value of the coal at the pit's mouth, making all just allowances to the parties chargeable in respect of their charges and expenses on account of such coal. The cases of *Martin* v. *Porter* (2) and *Morgan* v. *Powell* (3), were cited in the course of the argument, and although there is no particular reference to them in the judgment, I cannot suppose that the very plain principle which had been thereby established was dissented from by the Lord Chancellor, or that he meant the "just allowances" mentioned in his decree to extend beyond those which were sanctioned by those cases. When *Powell* v. *Aiken* was decided, the Court had not the power, which it now possesses under *Lord Cairns' Act*, of assessing damages consequential upon the unlawful working: but in a subsequent case, *Hunt* v. *Peake* (4), after the statute had come into operation, the same Judge directed an inquiry as to the value of the minerals removed, and as to the damages which the Plaintiff had sustained by reason of the Defendant's working.

In a case of *Hilton* v. *Woods* (5) the Vice Chancellor *Malins* adopted the principle of *Wood* v. *Morewood* (6), and fixed the amount of the sum payable to the Plaintiff by the value of the coal, as if the coal-field had been purchased by the Plaintiff. It was said, in the course of the discussion, that the Vice-Chancellor's decision was appealed from, but that a subsequent compromise prevented the prosecution of the appeal. However this may have been, I do not find that, having regard to the facts in the two cases I have lastly referred to, and in both of which the question was one of right, the principle upon which just allowances were directed is at all at variance with the previous decisions.

It appears to me, therefore, that the decree should direct an inquiry as to the market value at the pit's mouth of the coals worked and gotten by the Defendants from the Plaintiffs' mine, making to the Defendants all just allowances for the cost and expenses incurred by them in bringing such coal to the pit's mouth, but not including the cost of getting or severing the coal; that the Defendants should be ordered to pay to the Plaintiffs the

(1) 4 K. & J. 343.
(2) 5 M. & W. 351.
(3) 3 Q. B. 279.
(4) Joh. 705.
(5) Law Rep. 4 Eq. 432.
(6) 3 Q. B. 440, n.

V.-C. B. 1870 LLYNVI COMPANY v. BROGDEN.

amounts which shall appear, in the result of such inquiry, to be the value of the coal, after deducting the amount of such allowances; that a further inquiry should be made whether the Plaintiffs have sustained any and what damage by reason of the Defendants having broken through the boundary between their mine and the Plaintiffs' mine; with a declaration that the Defendants are liable to pay to the Plaintiffs the amount, if any, of the damage which shall be ascertained in the result of such inquiry; and then, further, an order that the costs of the suit up to the date of the decree be paid by the Defendants to the Plaintiffs; adjourning the further consideration and subsequent costs.

Solicitors for the Plaintiffs: Messrs. *Willoughby & Cox.*
Solicitors for the Defendants: Messrs. *Tahourdin.*

V.-C. B. 1870 *Nov.* 18.

In re NORTH KENT RAILWAY EXTENSION RAILWAY COMPANY.

KINCAID'S CASE.

Company—Winding-up—Director—Qualification—Contributory.

By a local Act, which embodied the *Companies Clauses Act* (1845), it was enacted that *A.* and all other persons who had already subscribed or should thereafter subscribe to the undertaking should be united into a company for the purposes of the undertaking, that the number of directors should be four, and that the qualification of a director should be the possession of twenty-five shares in the undertaking; and further, that *A.* and three other persons named should be the first directors, and should continue in office until the first ordinary meeting, and at such meeting the shareholders might either continue in office the directors appointed by the Act or might elect a new body of directors.

At the first meeting directors were appointed other than *A.* and the three persons named in the Act, and to each of these directors twenty-five shares were allotted. No other shares were ever allotted.

A. never applied for nor had allotted to him, nor paid any sum of money on account of, any share in the undertaking. The company being ordered to be wound up:—

Held, that *A.* must be settled on the list of contributories for twenty-five shares.

ADJOURNED SUMMONS.

By the *North Kent Railway Extension Railway Act*, 1865 (28 & 29 Vict. c. cccl xxv), which incorporated the *Companies Clauses Con-*

solidation Act, 1845, it was, amongst other things, provided (sect. 5) that "*Octavius Ommaney, James Stewart Kincaid*, and all other persons and corporations who have already subscribed or who shall hereafter subscribe to the undertaking, their executors, administrators, successors, and assigns respectively, shall be united into a company for the purposes of the undertaking."

Sect. 9 provided that "the number of directors shall be four, and the qualification of a director shall be the possession, in his own right, of twenty-five shares in the undertaking;" and by sect. 12 it was enacted that "*Octavius Ommaney, James Stewart Kincaid, William Francis Dobson*, and *Joseph Rivolta* shall be the first directors of the company, and shall continue in office until the first ordinary meeting to be held after the passing of this Act; and at such meeting the shareholders present, personally or by proxy, may either continue in office the directors appointed by this Act, or any number of them, or may elect a new body of directors, or directors to supply the places of those not continued in office, the directors appointed by this Act being eligible as members of such new body."

Sect. 14 provided that "it shall not be lawful for the company to issue any share, nor shall any share vest in the person accepting the same, unless and until a sum, not being less than one fifth part of the amount of such share, is paid up in respect thereof."

The capital of the company was to have been £120,000, in 12,000 shares of £10 each.

On the 4th of January, 1866, a general meeting of the shareholders was held, at which meeting directors of the company were elected. To each of these directors so elected twenty-five shares were issued, and these were the only shares ever issued, the undertaking having been a failure from the commencement.

Mr. *Kincaid*, now of 6, *Leinster Street, Dublin*, was not one of the directors elected at the above meeting, nor was he present.

He said he never accepted the office of, nor acted as, a director, and never attended a meeting of directors. He never applied for or received, or agreed to receive, an allotment, or subscribed or agreed to subscribe for any shares or share in the company. It was stated, however, and not denied, though not strictly proved, that in conformity with the then standing orders of the House

V.-C. B. 1870

KINCAID'S CASE.

of Commons, he signed a print of the bill, which afterwards became the Act above referred to.

The company was, by virtue of the 31st section of the *Railway Companies Act*, 1867 (30 & 31 Vict. c. 127) ordered to be wound up under the *Companies Act*, 1862; and on the 14th of February, 1870, an official liquidator was appointed.

In settling the list of contributories, the official liquidator placed Mr. *Kincaid's* name on the list for twenty-five shares in respect of his qualification. Mr. *Kincaid* opposed; and the summons was now adjourned, on behalf of the liquidator, into Court.

Some discussion took place with regard to the admission of an affidavit which had been filed by Mr. *Kincaid* (which was ultimately read), in which he stated that he had no recollection of signing the print of the bill; and that, if he did so, it was in the belief that it was a mere matter of form required by the Legislature, and without understanding he was thereby incurring any liability.

Mr. *Kay*, Q.C., and Mr. *Bradford*, for the official liquidator:—

Sect. 3 of the *Companies Clauses Consolidation Act* (8 Vict. c. 16) enacts that the words "the directors" shall, in that and the special Act, include all persons, under whatever name, having the direction of the undertaking; and sect. 85 enacts that no one shall be capable of being a director unless he be a shareholder, and unless he be possessed of the prescribed number of shares, if any number be prescribed. The liability of a shareholder in an unregistered company to contribute is declared by sect. 200 of the *Companies Act*, 1862. Mr. *Kincaid's* liability is therefore clear.

[The following authorities were cited, but the case was decided independently of them: *Kidwelly Canal Company* v. *Raby* (1); *Marquis of Abercorn's Case* (2); *Currie's Case* (3); *Lindley* on Partnership (4); *East Gloucestershire Railway Company* v. *Bartholomew* (5); *Ex parte Stock* (6).]

Mr. *Fry*, Q.C., and Mr. *G. Sangster Green*, for Mr. *Kincaid*:—

Mr. *Kincaid* is not liable to any extent; or, if at all, only to the extent of one share.

(1) 2 Price, 93.
(2) 4 D. F. & J. 78, 110, 115.
(3) 3 D. J. & S. 367.
(4) Page 1338.
(5) Law Rep. 3 Ex. 15.
(6) 12 W. R. 814, 994; 10 Jur. (N.S.) 812.

4 De G. J. S. 426.

Cyfc & Jur. N.S. 951.

Neither the register of members nor the subscription contract is produced. It must be assumed that his name is not on either.

The construction of the *Companies Act* rather comes to this, that its effect is to deprive a man of the office of director, if he does not take shares.

Mr. *Kincaid* was, no doubt, constituted by the Act a director, but provisionally only, until the first ordinary meeting, at which the shareholders might either continue the directors already appointed or elect new ones. They did elect new ones, to whom only were shares allotted. The meeting did, in fact, elect a new direction, of which Mr. *Kincaid* was not a member.

A mere signature to a document, without more, does not amount to a contract: *Haynes* v. *Haynes* (1); *Tothill's Case* (2); *Thames Tunnel Company* v. *Sheldon* (3).

Mr. *Kay*, in reply:—

If this gentleman is a member for one share, he must be a member for twenty-five shares.

Did any one ever hear of an Act of Parliament being altered to suit the terms of an alleged contract?

It is immaterial whether Mr. *Kincaid* acted or not; he has not fulfilled the obligations imposed on him by the statute.

An agreement to take shares is sufficient to make a man a contributory.

The answer to the argument that the qualification was only for those directors who "should be elected" thereafter, is to be found in this, that the qualification clause precedes that by which Mr. *Kincaid* and the three others were appointed.

The principle of "holding out" also applies. Persons might have been induced to take shares on the faith of these names being in the statute.

SIR JAMES, BACON, V.C.:—

In my opinion this case must be decided upon the Act of Parliament. Although it is very useful and interesting to know what has been decided in cases which have some sort of analogy to that which is before the Court, I do not think the argument in

(1) 1 Dr. & Sm. 426, 432. (2) Law Rep. 1 Ch. 85.
(3) 6 B. & C. 341.

V.-C. B. 1870 KINCAID'S CASE.

this case is helped by the reference to any of the cases that have been cited.

If Mr. *Kincaid's* case had been that his name was by some abuse or misrepresentation inserted in the Act of Parliament, there would have been some difficulty in dealing with the question. But he makes no such case. Upon his own statement he must be taken to have been one of the promoters of this Act of Parliament. The Act of Parliament enacts:—[His Honour read the clauses extracted above.]

16 D. 203

Now, does it do any violence to the words of this Act of Parliament, or to the contract which must have preceded it, to say that it was framed on the footing of representations made to Parliament by Mr. *Kincaid* and others that they desired to be a corporation, that they desired to have power to carry on the corporation business by means of a direction consisting of four persons, each holding twenty-five shares; and, consequently, that the Legislature was induced to confer powers on the company upon those terms and conditions only? Mr. *Kincaid's* own affidavit removes from the case the possibility of saying he must be taken not to have been perfectly conversant with and cognisant of everything that took place. It is admitted that he must be held to be a shareholder to the extent of one share. That admission being made, as indeed it could not be withheld, what guide has the Court to say in what degree and how is he a shareholder but by reference to that clause in his Act of Parliament?—for I have a right so to consider it, being an Act of Parliament obtained by him upon his Petition and upon his evidence. What right have I to say that Mr. *Kincaid*, who is constituted a director from the time of the passing of the Act until the first ordinary meeting shall be held under it, is a director with any less than that qualification which he himself inserted in the statute, as being necessary to holding the office?

In my opinion, Mr. *Kincaid* must be settled upon the list of contributories for twenty-five shares.

Mr. *Kay* asked that he might be ordered to pay the costs.

Mr. *Fry* said he understood this particular case was selected to represent all the four.

Ultimately, the official liquidator not pressing, no order was made as to costs, except that the official liquidator was to have his costs out of the estate.

V.-C. B. 1870 KINCAID'S CASE.

Solicitor for the Official Liquidator: Mr. *Walter Webb.*
Solicitor for Mr. *Kincaid:* Mr. *G. S. Warmington.*

GIRDLESTONE *v.* NORTH BRITISH MERCANTILE INSURANCE COMPANY.

V.-C. B. 1870 *Nov.* 4.

Pleading—Exceptions to Answer—Discovery.

In 1862 a policy of assurance was granted upon the life of *A.*, who about the same time went to reside in *India.* On account of *A.*'s bad state of health an additional premium was charged, but the Indian extra rate was not charged by the company, who alleged that they did not know of *A*'s departure for *India.* In 1868, the days of grace having expired, the company declined to reinstate the policy except upon the terms of payment of the Indian extra rate for the period that had elapsed since the policy was effected, relying upon the condition contained in the policy, that it should be void if the assured should go beyond *Europe* without obtaining permission of the directors on payment of a premium adequate to the extra risk. *A.* filed his bill, praying a declaration that he was entitled to the benefit of his policy upon payment of the premium originally charged, with liberty to reside in *India* without extra premium; and interrogated the company as to their habit with regard to similar cases at the time his policy was issued, calling upon them to take ten policies immediately preceeding and immediately subsequent to the date of *A.*'s policy, upon the lives of persons about to start for *India* in the Civil Service, and to state whether any such licenses and extra payments were given or made in such cases, and the form of the respective policies:—

Held, upon exceptions to answer, that the Defendants were bound to give the discovery sought by the interrogatory, for the purpose of enabling the Plaintiff to establish the case of conduct and waiver in similar cases raised by the equity of his bill.

EXCEPTIONS TO ANSWER.

On the 26th of December, 1862, a policy was issued by the Defendant company upon the life of Plaintiff, who went out to *India* as a civil servant within a few days before the policy was actually issued. In ignorance, as it was alleged, of the Plaintiff's departure for *India*, the company had not charged him with the Indian extra rate, though an additional or special premium was charged on account of the bad state of Plaintiff's health. By one

V.-C. B.
1870
GIRDLESTONE v. NORTH BRITISH MERCANTILE INSURANCE CO.

of the conditions attached to the policy it was stated that "policies shall become void if the parties whose lives shall have been assured shall go beyond the limits of *Europe*, or shall die on the high seas . . . unless in each case permission shall have been granted by the directors, which may be obtained on paying a premium adequate to the extra risk."

The premiums were regularly paid until 1868, when, the days of grace for payment of the premium having expired, the company declined to reinstate the policy (which contained the usual condition that the policy might be reinstated after six months from the expiration of the days of grace upon payment of the premium, with interest, and proof satisfactory to the directors of the health of the assured), except upon the terms of payment to them of the Indian extra premium for the years that had elapsed since the assurance was effected, and in a letter of the 24th of April, 1868, stated: "We do not appear to have been aware that your son (Plaintiff) was going immediately to *India* when the insurance was effected, otherwise the Indian rate would of course have been charged."

In a subsequent letter of the 11th of June, 1868, the company wrote, stating that on the 20th of November, 1862, Messrs. *Hawkins & Sylvester* (the *Oxford* creditors on whose behalf the policy had been effected), "wrote to the office intimating that Mr. *Girdlestone* has obtained a Civil Service appointment in *India*, for which he starts in March next. This information was no doubt afforded with the view of preventing the company making an immediate charge for an increased risk, as I need hardly observe that extra premiums for foreign residence are never chargeable while the parties are in this country. I mean that the extra commences with the date of departure. . . . The policy issued had indorsed upon it very distinct terms and conditions particularly referred to in the body of that document, and it was there most distinctly shewn that before Mr. *Girdlestone* could go beyond the European limits, he must obtain the necessary license and pay the extra premium chargeable for the particular place to which he was bound. This very clearly-defined rule Mr. *G.* ignored by starting for *India* as he did, and so nullified his policy."

The Plaintiff charged that the contention raised by the company

in these letters was entirely contrary to the truth and honour of the agreement for the insurance of the Plaintiff's life and the whole course of conduct of all parties concerned in the transaction; and in answer to the allegations by the company in the letter of the 11th of June, 1868, that they had been told, in order to prevent the immediate charge for an increased risk, that the Plaintiff did not start for *India* until March, 1863, the Plaintiff insisted that it was by mistake, and without his knowledge, and denied that he, or any person on his behalf, ever informed the company that he intended to remain in *England* until March, 1863. Under these circumstances the bill was filed raising the case that the company well knew of the residence of the assured in *India*, and, with that knowledge, had not charged him with any extra rate beyond the special premium already charged. A declaration was prayed that the Plaintiff was entitled to the benefit of his policy upon payment of the premium originally charged, with liberty to reside in *India* without extra premium.

The interrogatories contained the following passage: "State what was the habit of Defendant company in 1862 with regard to similar cases, and, in particular, take twenty instances of insurances granted by Defendant company on the lives of gentlemen about to start for *India* in the Civil Service, of which ten are the ten immediately preceding the 25th of December, 1862, and ten are the ten immediately subsequent thereto; and state the date of the policies respectively, and of the departure from *England* of the gentlemen whose lives were insured respectively, and whether any such licenses or extra payments were given or made in the respective cases, and what is the form of the respective policies."

By their first answer the company had not given the information required by this interrogatory, but simply stated that, in the absence of any special agreement, it was their habit, in cases similar to the Plaintiff's, to grant policies at the ordinary or at a special premium (according to the character of the life), leaving it to the assured to give notice when about to leave the country, and apply for permission of the directors to do so upon payment of the extra premium.

Upon argument, in July last, the Vice-Chancellor allowed an exception for insufficiency to that portion of the answer.

V.-C. B. 1870

GIRDLESTONE v. NORTH BRITISH MERCANTILE INSURANCE CO.

The Defendant company had since put in a further answer declining, and submitting that they were not bound, to take twenty instances of insurances granted by them on the lives of gentlemen about to start for *India* (following the words of the interrogatory), or, in fact, to set forth any such particulars or give any such discovery as sought by such interrogatory.

The Plaintiff had again set down his original exception.

Mr. *Wintle* (Mr. *Kay*, Q.C., with him), in support of the exception:—

The question in the suit is not as to the interpretation of a written document, but one of conduct, viz., whether there has been a waiver by the company of the condition annexed to the policy, and whether it is one which is not generally enforced; and for this purpose it is essential that the Plaintiff should know what was the practice of the company, at the time when his policy was granted, in similar cases. The information sought by the interrogatory being, therefore, pertinent to the case made by the bill, and founded upon the general allegations of the bill, the Defendants are bound to answer, although the interrogatory is not founded on any specific allegation: *M'Garel* v. *Moon* (1); *Marsh* v. *Keith* (2). [He also cited *Rossiter* v. *Trafalgar Life Assurance Association* (3).]

Mr. *Wickens*, and Mr. *Davey*, for the Defendants:—

The bill is, in reality, filed for the rectification of a contract entered into with the Plaintiff, his case being that we agreed to grant him a policy at an extra premium for residence abroad, while it is stipulated by his policy that it shall be void on residence beyond the limits of *Europe* without licence from the directors. The Plaintiff is not entitled to interrogate us as to policies granted to other people. Although it is not necessary to have a special allegation in the bill on which to found the interrogatory, yet the interrogatory must be pertinent to some part of the case alleged. But there is nothing in the bill upon which to ground the interrogatory as to the habit of the company; and further, as each policy

(1) Law Rep. 10 Eq. 22.
(2) 1 Dr. & Sm. 342.
(3) 27 Beav. 377.

is a special contract, his case cannot be affected by policies granted to other people. In asking us for this information, the Plaintiff is, in truth, asking us to set out the evidence by which we mean to support our case at the hearing; and, as in the patent cases, the Plaintiff has no right to a discovery of the particulars or instances on which the Defendants rely, or to compel them to furnish him with the names of the witnesses whom they intend to produce to establish their case: *Daw* v. *Eley* (1); *Bovill* v. *Smith* (2).

Mr. *Wintle,* in reply.

SIR JAMES BACON, V.C.:—

I must say I think this matter remains exactly as it was when the exceptions were last argued. The most important objection made on behalf of the Defendants is, that there is no sufficient allegation or charge on which this interrogatory is founded. I think there is. I think that the allegation in the bill is sufficient for the purpose, stating, as it does, the Plaintiff's equitable case, first, upon the agreement, then upon the right to rectify, and then introducing the statement of the Defendants contained in their letter, which expresses their grounds of defence.

By the 30th paragraph in the bill the Plaintiff charges that the contention raised by the letter of the 24th of April, 1868, and the letters subsequently written on behalf of the Defendant company, is entirely contrary to the truth and honour of the said agreement for the insurance of his life and the whole course of conduct of all parties concerned in the transaction. Part of that course of conduct, he might have said much more distinctly, was to be proved by the way in which they had entered into policies of assurance with other persons situated as the Plaintiff was, the contract being the same in all those cases. That is not distinctly alleged; but it is enough if there is in the bill, and in the equities suggested by the bill, a sufficient statement to require the answer which these exceptions desire to have. I think, therefore, the first objection, that there is nothing in the bill on which the interrogatory is founded, is not to be sustained.

The other ground on which the discovery is refused is, that it

(1) 2 H. & M. 725. (2) Law Rep. 2 Eq. 459.

V.-C. B. 1870

GIRDLESTONE v. NORTH BRITISH MERCANTILE INSURANCE CO.

would be extorting from the Defendants the evidence of their case. But they do not insist that they can, by the instances which are required by the interrogatory, prove their case, nor is it in the nature of things that they could. They stand upon the policy as it appeared, and they put the Plaintiff to prove the circumstances under which he says the literal construction of the policy should not prevail.

The patent cases which have been referred to have no application whatever, in my opinion, to the present case; because there, if the discovery had been given or compelled, it might have required the Defendant to set that out in the shape of a statement which he would afterwards have a right to prove in evidence, and which might be unfairly disclosing his case.

They are not asked, in truth, to do anything of that nature here. The Plaintiff means, I suppose, if the bill stands as it does now, to rely upon and to prove that the whole course of conduct of both parties is inconsistent with the allegation set up in that letter, which letter is, in fact, the answer. The answer does not go further than that. Why is he not entitled to the discovery? If evidence of the course of conduct is not contained in the books of the company he is not entitled to the discovery. What he asks for is only a transcript from their books, or a statement from their books that they did in ten instances before and in ten instances after enter into similar contracts with certain other persons in similar cases.

I cannot conceive that that is disclosing any portion of their defence, or is any such defence as the Court protects them from giving discovery of.

The objection that if the Plaintiff has a right to ask for ten he may ask for a hundred, which would be very unreasonable, is answered by the observation that if he had asked for a hundred, or for a great number of instances, it would have been for the Court to say whether that was reasonable or not. I cannot say that what he has asked is not reasonable. When this cause comes to be heard, and when the *onus* is upon the Plaintiff to prove what the whole course of conduct of the parties to this agreement was, if he can then shew that in certain instances before, and in certain instances after, that course of conduct on which

he relies has prevailed between the present company and other parties, he has a right to submit that to the judgment of the Court; but he cannot raise that question if the Defendants are at liberty to withhold the disclosure which he now requires.

As well as I can recollect, the substance of all that has been now said was said upon the former argument. I then thought that the Plaintiff was entitled to have the discovery which he required; and although I declined, as it was right in my judgment that I should decline, to prescribe to the Defendants the manner in which they ought to answer, yet I thought then that they had not sufficiently answered, and I think so still. These exceptions must therefore be allowed.

Solicitors: Mr. *J. Girdlestone*; Sir *Wm. Drake.*

C. J. B.
1870
Nov. 14, 21.

Ex parte BIRMINGHAM GASLIGHT AND COKE COMPANY.

In re ADAMS.

Bankruptcy Act, 1869, *ss.* 95, 125, 126—*Distress—Seizure and Sale—Distinction between Liquidation by Arrangement and Composition with Creditors.*

Distress under a statutory power, levied by a gas company against the goods of a debtor, who, on the day of but after the seizure, filed a Petition for liquidation by arrangement, and obtained an *ex parte* injunction restraining the sale of the goods seized. At the first meeting of creditors a composition under the 126th section of the *Bankruptcy Act*, 1869, was resolved upon by the requisite majority of creditors, and the resolution was afterwards duly confirmed and registered. Subsequently, on the application of the debtor, the order appealed from was made, directing the company to deliver up the goods seized by them under the distress:—

Held, that the order must be discharged.

Cases of liquidation by arrangement under sect. 125, and composition with creditors under sect. 126, distinguished.

THIS was an appeal from an order made by the Registrar of the County Court of *Warwickshire*, held at *Birmingham*, directing the *Birmingham Gaslight and Coke Company* to deliver up certain goods seized by them under a statutory power of distress. Under the 58th section (1) of the *Birmingham Gas Act*, 1855, and the 138th section (2) of the *Lands Clauses Consolidation Act*, 1845 (incorporated with the special Act), the company had power to levy by distress and sale sums, the amount of which should be undis-

(1) Sect. 58 of the *Birmingham Gas Act*, 1855, is as follows:—

"All sums of money due to the company for the supply of gas or for the hire or fixing of metres or fittings, and all damages, costs, and expenses by this Act or any Act incorporated herewith directed to be paid, and the amount of which shall not be disputed, may be levied by distress; and any justice, on application, shall issue his warrant accordingly."

(2) Sect. 138 of the *Lands Clauses Consolidation Act*, 1845, is as follows:—

"Where, in this or the special Act, or any Act incorporated therewith, any sum of money, whether in the nature of penalty, costs, or otherwise, is directed to be levied by distress, such sum of money shall be levied by distress and sale of the goods and chattels of the party liable to pay the same; and the overplus arising from the sale of such goods and chattels, after satisfying such sum of money and the expenses of the distress and sale, shall be returned, on demand, to the party whose goods shall have been distrained."

puted, and which should be due to them for the supply of gas, &c. *Adams* was indebted to the company for gas supplied to him, and the company, under their statutory power, on the 29th of July, 1870, obtained a warrant of distress and seized the goods in question, and removed them for the purpose of sale. On the same day, but after the seizure, *Adams* filed, in the County Court of *Warwickshire*, a Petition for liquidation by arrangement under the 125th section of the *Bankruptcy Act*, 1869, in Form 106, and obtained from the Registrar, and served on the Appellants, an *ex parte* injunction restraining the sale of the goods. At the first meeting of creditors, held on the 15th of August, 1870, the proceedings took the form of a composition under sect. 126, and a resolution (duly confirmed at a subsequent meeting on the 25th of August and registered) to accept a composition of 5*s.* in the pound was passed. The Appellants appeared as creditors in the lists furnished by the debtor, but they declined to accept the composition or restore the goods. The County Court, on the application of the Respondent, on the 20th of September, 1870, made the order appealed from.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the Appellants, the *Birmingham Gas Company* :—

We are secured creditors; but this is not an execution within the meaning of sect. 95, sub-sect. 3 of the *Bankruptcy Act*, 1869, and does not require the protection of that section. And the cases of *In re Gwynn* (1), *In re Norton* (2), and *In re Skinner* (3), decided in this Court, do not apply. The Registrar considered the protection clause and these cases applicable. There is nothing in the Act of 1869 to take away our security, which is a statutory pledge, and not an execution: *Gilbert* on Distress (4). Even if this distress were an execution within the meaning of the word in sect. 95, it would be valid, for these are proceedings for composition and not for liquidation by arrangement, and the two are wholly different. Under proceedings for composition no trustee is appointed, and there is no person in whom the property of the debtor vests, as in cases of liquidation by arrangement or bankruptcy. The secured creditor is entitled, notwithstanding bankruptcy, unless

(1) Law Rep. 10 Eq. 419.
(2) Ibid. 425.
(3) Law Rep. 10 Eq. 432.
(4) 4th Ed. p. 3.

C. J. B. 1870 *Ex parte* Birmingham Gaslight and Coke Company. *In re* Adams.

there is some special provision in the *Bankruptcy Act* to the contrary: *Parsons* v. *Lloyd* (1). There is no such provision here, there being no section in the Act of 1869 corresponding with sect. 184 of 12 & 13 Vict. c. 106.

Mr. *Reed*, for the Respondent:—

There is no distinction between this distress and an execution; and if there were, the Court has power, by sect. 13, to restrain proceedings in any execution or "other legal process" against the debtor. The Petition is in Form 106, and the bankrupt thereby declares his inability to pay his debts. The filing such a Petition is an act of bankruptcy: *In re Jones*, before your Honour on Feb. 25, 1870; and therefore invalidates this execution, since it has not been completed by sale. And the principle of *Edwards* v. *Scarsbrook* (2) does not apply; and if it did, that case has been overruled by *Edwards* v. *Gabriel* (3). Under sect. 126 there is no clause divesting the debtor's property, as in the case of liquidation by arrangement, but sub-sect. 7 of sect. 126 is as follows:—

"The provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom are shewn in the statement of the debtor, produced at the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors."

In this case the company were included in the statement of the debtor, and they are bound by the resolution to compound. In principle there is no difference between liquidation by arrangement and composition. In liquidation the trustee is responsible for the distribution of the debtor's estate, in composition the debtor himself is responsible.

Mr. *De Gex*, in reply.

Nov. 21. Sir James Bacon, C.J., after stating the facts and the order appealed from, continued:—

The great difference between cases of liquidation, where the

(1) Law Rep. 1 Ex. 307, n.
(2) 32 L. J. (Q. B.) 45.
(3) 30 L. J. (Ex.) 245; 31 Ibid. (Ex.) 113.

C. J. B.
1870
Ex parte BIRMINGHAM GASLIGHT AND COKE COMPANY.
In re ADAMS.

creditors have resolved that their debtor's affairs are to be liquidated by arrangement, and not in bankruptcy, and cases in which creditors have resolved to accept a composition in satisfaction of their debts, must in all cases be observed. The rights of the debtor and his creditors are wholly different in the two cases. Both are initiated by a Petition filed by the debtor, stating his inability to pay his debts. At that time it is uncertain whether the liquidation will or will not be effected by means of the appointment of a trustee and the distribution among the creditors of the whole of the creditor's estate, with all the powers and provisions, which are enacted respecting bankruptcy, and it is at the option of the requisite majority of creditors, at a meeting duly convened, to determine whether the estate shall be so distributed and dealt with or not. And to this state of things the 125th section and the rules applicable to that section, relate. But it is also in the power and at the option of the creditors, under the 126th section, at a like meeting, to resolve that, instead of exercising the powers conferred upon them by sect. 125, they will, "without any proceedings in bankruptcy," accept a composition in satisfaction of their debts, and thereupon machinery is provided by the statutes and the rules for giving effect to such composition. Until at the meeting of the creditors it has been determined by their resolution whether the proceedings shall be under the 125th or the 126th sections, it would be quite right that an injunction should be granted, restraining any creditor's process against the debtor's person or estate (as was properly granted in this case); but when once such a resolution has been passed as would make it improper to appoint a trustee, the sub-sects. 5 and 7 of sect. 125 are inapplicable. The property of the debtor is not taken from him nor vested in a trustee; it is not "distributed in the same manner as in bankruptcy." On the contrary, the debtor is left in the possession of his assets for the very purpose, it may be, of enabling him to fulfil the engagement he has entered into with his creditors to pay them the stipulated composition. The terms agreed to are binding upon all the creditors, may be embodied in a deed and secured by covenants, if the creditors so will, and may be enforced by the Court, as any order of the Court may be. But there is no power in this latter case to deprive secured creditors

C. J. B. 1870

Ex parte Birmingham Gaslight and Coke Company. *In re* Adams.

of their securities, no relation of title to any act of bankruptcy prior to the presentation of the Petition or otherwise, nor anything in which the creditors, who have resolved to accept a composition, have any interest beyond enforcing the performance of that condition on which they have agreed to accept the composition. It is because these considerations do not seem to have been presented to the learned Registrar, by whom the order appealed from was made, that the matter has miscarried. The argument before him, as I understand from the statements which have been made to me on this occasion, was urged as if the debtor, on whose behalf the application was made, was possessed of all the rights which a trustee, duly appointed under the 125th section, would have had. Reference seems to have been made to the cases *In re Gwynn* (1), *In re Norton* (2), and *In re Skinner* (3), recently decided in this Court. I adhere in every respect to those decisions and to the principles which I endeavoured there to explain, as governing the administration of the law established by the *Bankruptcy Act* of 1869; but in each of those cases the sole question was as to the rights of a trustee in whom, under the 125th section, was vested the whole estate of the debtor, upon trust to recover and distribute such estate in the same manner as in bankruptcy. No such principle is applicable to the case before me, and I am therefore of opinion that the order appealed from must be discharged, and as the application made by the debtor to the Court at *Birmingham* was in itself not less unreasonable than it was unsustainable in law, I direct the debtor, who is the Respondent, to pay to the Appellant the costs of the appeal.

Order discharged. Respondent to pay the costs of the appeal and of the application to the Court below.

Solicitors for the Appellants: Messrs. *Burton, Yeates, & Hart,* agents for Messrs. *Tyndall, Johnson, & Tyndall, Birmingham.*

Solicitors for the Respondent: Messrs. *Deere & Bourne,* agents for Mr. *W. E. Fallows, Birmingham.*

(1) Law Rep. 10 Eq. 419. (2) Law Rep. 10 Eq. 425.
(3) Law Rep. 10 Eq. 432.

Ex parte ALLEN. *Ex parte* PAGE. *In re* MIDDLETON.

C. J. B.
1870
Dec. 5.

Bankruptcy Act, 1869—*Bills of Sale—Priority.*

A. and *P.* were each of them holders of a bill of sale on the same part of a non-trader's property. *A.*'s security was dated the 10th of February, 1870, and registered on the 2nd of March, 1870. *P.*'s was dated the 28th of February, 1870, and registered on the 18th of March, 1870. *P.* had no notice of *A.*'s bill of sale at the date of his own, and took possession before he received notice. On the 4th of April *A.* gave notice of his charge, but notwithstanding this *P.* proceeded to sell the goods. After the seizure, and before the sale, the debtor was adjudicated bankrupt:—

Held, that the fact that *P.* had been the first to take possession did not give him priority over *A.*, and that the latter was entitled to the first charge upon the proceeds of the sale.

THESE were two appeals from an order of the 2nd of September, 1870, made by the Registrar of the County Court of *Oxfordshire*, held at *Banbury*.

On the 10th of February, 1870, *Middleton*, who was a farmer, and therefore a non-trader (*Bankruptcy Act*, 1869, sch. 1), executed a deed, by which he assigned all his furniture, farming stock, and effects to *Allen*, in consideration of a sum of £340, then due, and a present advance of £50. This deed was registered as a bill of sale on the 2nd of March, 1870, and contained a power for *Allen* to enter, if necessary, by force, and to seize and sell the property at any time. On the 28th of February the sheriff was in possession of *Middleton's* effects, and on that day, in consideration of the payment by *Page* of the sum due to the sheriff (£752) and of £375 then owing to *Page*, *Middleton* executed a second bill of sale between himself of the one part and *Page* of the other part, as security for the payment to the latter of the total sum of £1127, with interest, and this deed was registered on the 18th of March.

Page, at the date of his own security, had no notice of *Allen's*.

The two deeds comprised the same property, and contained similar provisions and powers, except that *Page* had no express power to take possession by force.

C. J. B.
1870
Ex parte ALLEN.
Ex parte PAGE.
In re MIDDLETON.

On the 21st of March, 1870, *Page*, being still without notice of *Allen's* security, took possession.

The act of bankruptcy (a declaration of insolvency by the bankrupt) took place on the 4th of April, and the adjudication on the following day. *Allen* gave notice of his prior claim to *Page* on the 4th of April, but notwithstanding that the latter proceeded to sell the goods, which realised a sum of £477 3*s*. 4*d*. *Allen* brought an action for £390 (the amount secured by his bill of sale) against *Page*, who thereupon applied for, and obtained from the Registrar of the County Court, an injunction restraining the action; the proceeds of the sale were paid into Court, and subsequently the order appealed from, which declared both the bills of sale void as against the trustee under the bankruptcy, was made.

[The arguments were chiefly upon the question as to the validity of the bills of sale; but since the Chief Judge decided that, upon the facts, the bills were valid, it is immaterial to state the arguments on this point.]

Mr. *E. U. Bullen*, for the Appellant *Allen*, in support of the first bill of sale, contended that the legal title to the goods was in his client at the time of the sale, and that nothing had been done which could deprive him of the first claim upon the fund in Court.

Mr. *De Gex*, Q.C., for the Appellant *Page*, argued that *Page* was entitled to priority, because by taking possession before *Allen* he had used superior diligence. A person who contracts for an interest in personal property must complete his title by possession; or, in the case of a *chose in action*, by giving notice of his interest, and for this reason, "a *bonâ fide* incumbrancer upon such property, who is without notice of a prior charge, and obtains possession, or gives notice of his own charge to the person who has the legal interest in or control over the property, shall generally be preferred to earlier claimants, who have not taken possession or who have given later or no notice, even though the holder of the property have by other means acquired notice of the earlier claim:" *Fisher* on Mortgages (1); *Daniel* v. *Russell* (2). A bill of sale need not be registered for twenty-one days as against assignees

(1) 2nd Ed. s. 1253. (2) 14 Ves. 393.

in bankruptcy and creditors, but as against another bill-holder, if the grantee of the security of earlier date does not do all he can to give notice of it, *i. e.*, register it, before the second creditor advances his money, and the second creditor is the first to obtain possession, the latter is entitled to priority. Here *Allen* did not register until the last moment, and did not take possession; *Page* advanced his money without notice, and did all he could to perfect his security by registration and taking possession; therefore his claim ought to be allowed in preference to *Allen's: Dearle* v. *Hall* (1); *Richards* v. *James* (2).

Mr. *Bagley*, for the trustee in bankruptcy, contended that both the bills of sale were acts of bankruptcy, and void.

Mr. *E. U. Bullen*, and Mr. *De Gex*, replied.

SIR JAMES BACON, C.J. :—

The facts do not justify the conclusion that the bills of sale were acts of bankruptcy. As to the question of priority, I know no principle which would require *Allen* to have taken possession in order to perfect his title against *Page*. The *Bills of Sale Act* (17 & 18 Vict. c. 36, s. 1), seems to assume that bills of sale are good against all the world, and only makes them void, if not registered in time, as against assignees in bankruptcy and execution creditors. Here *Allen's* bill was registered in time, and there was nothing to assign to *Page* except what might remain of the property after *Allen's* claim had been satisfied. Between *Allen* and *Page* this is a question strictly of their legal rights, and *Page* could not have filed a bill to restrain *Allen's* action. The case of *Dearle* v. *Hall* relates only to *choses in action*. *Daniel* v. *Russell* (3) is directly adverse to Mr. *De Gex's* contention. The charges of both Appellants are good as against the trustee, and *Allen* is entitled to have his debt discharged out of the fund in Court, and what remains after that, will go towards the satisfaction of *Page's* claim. I cannot give *Allen* the costs of the action in which he was restrained.

(1) 3 Russ. 1, 22, 23. (2) Law Rep. 2 Q. B. 285.
(3) 14 Ves. 393.

C. J. B.
1870
Ex parte ALLEN.
Ex parte PAGE.
In re MIDDLETON.

Order discharged. Costs of all parties to be the first charge on the fund.

Solicitors for *Allen:* Messrs. *R. M. & F. Lowe,* agents for Mr. *T. Pain, Banbury.*

Solicitors for *Page:* Messrs. *Mackeson & Co.,* agents for Mr. *J. Kilby, Banbury.*

Solicitors for the trustee: Messrs. *Hayes, Twisden, & Co.,* agents for Mr. *J. B. Looker, Banbury.*

TEALL *v.* WATTS.

M. R.
1871
Jan. 14.

Practice—Partition—Sale—Prayer for Partition—Party out of Jurisdiction—Form of Decree—Partition Act, 1868 (31 & 32 *Vict. c.* 40), *ss.* 3, 9.

In a suit for a sale under the *Partition Act*, 1868, the bill ought to pray for partition as well as sale; *semble*:

An immediate decree for sale may be made, although one of the parties interested is out of the jurisdiction; but the decree must be served on the absent party before the sale is proceeded with; and, *semble*, advertisement of the decree in a newspaper is not sufficient service.

THIS was a suit by one of numerous tenants in common of real estate for a sale of the property under the *Partition Act*, 1868.

The bill did not pray for partition.

All the parties interested were before the Court, except one, who was believed to be resident in *Central America*.

Mr. *Jessel*, Q.C. (Mr. *C. A. Holmes* with him), for the Plaintiff:—

The *Partition Act*, 1868, s. 3, only enables the Court to decree a sale in a suit for partition, where if the Act had not been passed, a decree for partition might have been made. The bill does not pray for partition, and a question may be raised whether the Court has jurisdiction; we therefore propose to amend the prayer.

The MASTER OF THE ROLLS:—I think the bill had better be amended, and I give leave for that purpose.

Mr. *Jessel*:—On the bill, as amended, we propose to take a decree for an immediate sale.

Mr. *Swanston*, Q.C. (Mr. *Buchanan* with him), for one of the Defendants, proposed that the course adopted in *Peters* v. *Bacon* (1) should be followed, viz., that an immediate decree for sale should be made, and that notice of the decree should be given to the absent party by advertisement, with liberty to apply in Chambers as to proceeding with the sale if he should not come in after the appearance of the advertisements.

(1) Law Rep. 8 Eq. 125.

M. R. 1871 TEALL v. WATTS.

Mr. *Jessel*:—The difficulty in that is, that sect. 9 of the Act requires the decree to be served on absent parties; and advertisement in a newspaper is not service. In *Silver* v. *Udall* (1) and *Hurry* v. *Hurry* (2), Vice-Chancellor *James* held that service was necessary.

Mr. *J. T. Humphry*, for a Defendant, submitted that the decree ought not to direct an immediate sale, but inquiries only.

Mr. *Lindley*, for another Defendant.

LORD ROMILLY, M.R.:—

I doubt whether an advertisement alone would do, unless you could shew that the advertisement was brought to the notice of the party. I think I can make a decree for sale, and the Plaintiff can then apply at Chambers as to service of it on the party out of the jurisdiction.

Solicitors: Messrs. *Stuart & Massey*; Messrs. *Williamson, Hill, & Co.*; Mr. *Brooke*; Messrs. *Torr, Janeway, & Co.*

(1) Law Rep. 9 Eq. 227. (2) Law Rep. 10 Eq. 346.

HILL *v.* LANE.

V.-C. S.
1870
Nov. 10;
Dec. 3.

Demurrer—Fraudulent Misrepresentation—Bill for Money Demand—Concurrent Jurisdiction of Court of Chancery.

Demurrer to a bill alleging fraud committed by the Defendants, and seeking to recover money paid by Plaintiff for shares in a company in reliance on fraudulent misrepresentations by the Defendants, overruled.

Observations on *Ogilvie* v. *Currie* (1).

THIS was a demurrer.

The bill stated that the Defendants, previously to October, 1865, carried on business in *London*, in co-partnership as merchants under the firm of *Lane, Hankey, & Co.*; that on the 31st of December, 1864, the firm were wholly insolvent; that in the autumn of 1865 the deficiency continued to increase; that each of the partners was fully aware that the firm was insolvent, and that they were unable to pay their private debts; and that with a view of relieving themselves from liabilities in the autumn of 1865, they formed a scheme of getting up a joint stock company under the *Companies Act*, 1862, and of inducing such company to purchase the goodwill of their business for a very large sum. That in pursuance of such scheme they employed a *London* firm of accountants; that in further pursuance of the said scheme they induced certain other persons to become directors with them in a company intended to be called the *Merchants Company, Limited*, and about to be formed for the purpose of purchasing the Defendants' business.

That in contemplation of the formation of such company a deed was executed, dated the 4th of October, 1865, between the Defendants and one *F. Heritage*, a trustee for the company in course of promotion, which recited that the Defendants had carried on business in *London* for several years as merchants, and that it had been agreed by the vendors to sell the business to *Heritage*. The deed then witnessed that, in consideration of £62,500 to be paid to the vendors in manner thereinafter mentioned, they, the vendors, jointly

(1) 37 L. J. (Ch.) 541.

V.-C. S. 1870 HILL v. LANE.

and severally sold the business to *Heritage;* and that they would (except as thereinafter mentioned) liquidate all their existing debts and liabilities, and indemnify the company therefrom; . . . and that the vendors should and would guarantee to the shareholders a minimum dividend equal to £10 per cent. on the capital which should be called up, for a period of three years from the commencement of the business, by such instruments as should be approved by the company. And *Heritage* (as trustee only) covenanted to pay the £62,000 as follows: £37,500 within fourteen days after the allotment, 2500 £25 shares on which £15 should be deemed to be paid up, and £25,000, being the balance, by delivery at the same time, of debenture bonds bearing interest at £5 per cent., redeemable as in the indenture provided.

That on the 2nd or 3rd of October, 1865, the Defendants circulated a prospectus, which was briefly as follows:—

"The *Merchants Company, Limited.*
"Incorporated under *Companies Act*, 1862.
"Capital £500,000.

"First issue, £250,000 in 10,000 shares of £25 each; £1 to be paid on application, and £4 on allotment.

"A minimum dividend of £10 per cent. per annum for three years on the amount paid up is guaranteed, as hereinafter stated."

Then followed a list of the officers of the company. The prospectus, in the body of it, referred to the security afforded by large uncalled resources, and added that, in order to serve as an immediate basis of operations, arrangements had been made with Messrs. *Lane, Hankey, & Co.;* that such firm would liquidate all its obligations independently of the company, handing over only such current account and transactions as the board might wish to accept; that the goodwill of Messrs. *Lane, Hankey, & Co.'s* business had been purchased for £25,000, payable one-fifth annually, with 5 per cent. interest, and 2500 shares with £15 each credited. In issuing this amount the directors had taken into consideration the profits of the firm during the last six years, the present prospects of the business, and the manner in which payment for the goodwill had been accepted; that the vendors also agreed by their personal covenant to a minimum dividend of £10 per cent. during three years

on the paid-up capital, thereby giving a substantial proof of their confidence in the undertaking. The bill then set out the report of the accountants, stating that the gross commissions during the last six years, from the 1st of January, 1859, to the 1st of January, 1865, were £140,765 17*s.* 9*d.*, being an average of £23,460 19*s.* 7*d.* per annum, or a net commission of £106,900 17*s.* 4*d.*, giving an average of £17,816 16*s.* 2*d.* per annum. The prospectus further stated that applications for a large number of shares had been already received.

The bill alleged that the statement that Messrs. *Lane, Hankey, & Co.* would liquidate all their obligations was untrue, and known to be untrue; that the statement of the profits was wilfully false; that the gross profits during the period mentioned were, without deducting bad debts, £48,717 13*s.* 7*d.*, giving an annual average of £7286 5*s.* 7*d.*, and that the amount of the bad debts exceeded the profits; that the statement that Messrs. *Lane, Hankey, & Co.* would guarantee £10 per cent. was wilfully false, as the Defendants had not the means to do so; that the statement that a large number of shares had been applied for was also untrue, as only 850 shares at the date of the prospectus had been issued.

The bill also stated that the Plaintiff, relying on the statements in the prospectus, on the 7th of October, 1865, applied for forty shares, which were allotted to him, and on which he paid £1 on application, and on allotment £4 per share, which, with two subsequent calls of £200 each, made a total of £600. The bill then charged several fraudulent acts, such as the payment of the promised dividend out of a call payable on the 15th of January, 1866, when there were no profits; the causing a considerable number of the Defendants' shares to be forfeited in order to avoid payment of calls; that on the 22nd of August, 1866, the Defendants stopped payment, and executed a deed of inspectorship; that from the schedules and the affidavits filed under the inspectorship, the joint debts of *Lane, Hankey, & Co.* were shewn to be £282,498, including £45,292 3*s.* 9*d.* due to the company, against which sum certain creditors held securities estimated to produce £157,300, leaving utterly unsecured £125,198, while the value of the joint estate was under £20,000; that the separate debts of one partner were £13,735 9*s.* 4*d.*, including £2500 due to the company, securities held by creditors

V.-C. S. 1870 HILL v. LANE.

were £500, and the value of his separate estate was under £100; that the separate debts of another partner were £6245, including £2500 due to the company; securities, £3575; value of the separate estate, under £500; that the separate debts of the third partner were £69,315 12*s.* 6*d.*, including £1015 due to the company; securities held by creditors, £38,818; separate estate, under £5000; that a great portion of the securities of the joint and separate estates were worthless; that on the 12th of November, 1866, the company was ordered to be wound up compulsorily; that on the 7th of April an order was made by the Master of the Rolls for the performance of a conditional agreement, immaterial to this question, without prejudice to the Plaintiff's right to take proceedings against any of the directors, except one, *J. Chiles.*

The bill prayed as follows:—

1. That the Defendants might be ordered jointly and severally to pay to the Plaintiff £600 and interest. 2. That it might be declared that the Defendants were jointly and severally liable to make good to the Plaintiff the costs and charges he had been put to by reason of his taking shares in the company, or in consequence thereof; and that proper inquiries might be directed to ascertain the amount due to the Plaintiff in respect thereof, and for interest as aforesaid.

Mr. *Fooks*, Q.C., and Mr. *W. C. Fooks*, for the demurrer:—

This is a mere bill for damages, and the Plaintiff's remedy, if he has any, is at law.

The case is covered by authority. *Ogilvie* v. *Currie* (1) was a bill to cancel the allotment of fifty shares in the *Breech-loading Armoury Company* on the ground of fraud and misrepresentation in the prospectus. The bill also prayed that the Plaintiff's name might be removed from the list of shareholders, and for repayment of the moneys paid on deposit and allotment; and a demurrer was allowed.

[They also cited *Colt* v. *Woollaston* (2); *Evans* v. *Bicknell* (3); *Burrowes* v. *Lock* (4); *Slim* v. *Croucher* (5); *Cridland* v. *Lord De*

(1) 37 L. J. (Ch.) 541–7.
(2) 2 P. Wms. 155.
(3) 6 Ves. 174.
(4) 10 Ibid. 470.
(5) 2 Giff. 37; 1 D. F. & J. 518.

Mauley (1); *Green* v. *Barrett* (2); *Blair* v. *Bromley* (3); *St. Aubyn* v. *Smart* (4); *Ramshire* v. *Bolton* (5); *Ingram* v. *Thorp* (6); *Clarke* v. *Dickson* (7).]

V.-C. S. 1870 HILL v. LANE.

The VICE-CHANCELLOR:—Mr. *Dickinson*, I only wish to hear you on the case of *Ogilvie* v. *Currie* (8).

Mr. *Dickinson*, Q.C. (Mr. *W. R. Ellis* with him):—

On examination it will appear that Lord *Cairns'* observations are addressed only to the case as it was then presented to the Court. The Plaintiff, by his laches, had lost his right, such as it was, against the company; and having regard to this fact, all Lord *Cairns* held was, that the bill could not be maintained against the directors alone; but he never meant to lay down the general rule contended for. In any point of view it was a mere *dictum*, not necessary for deciding the case, and cannot be allowed to prevail against the long and well-settled decisions of the great Equity Judges who have held otherwise.

Dec. 3. SIR JOHN STUART, V.C.:—

The bill prays to recover from the Defendant moneys paid by the Plaintiff on the faith of representations made by the Defendant, which were false, and were made for the purpose of deceiving the Plaintiff and others. It avers that the Defendants, in the year 1865, carried on the business of merchants in *London*, under the firm of *Lane, Hankey, & Co.*; that the firm was wholly insolvent, and each of the Defendants who were partners in it also insolvent, and unable to pay their private debts; that being aware of their insolvency, with a view of relieving themselves, they formed a scheme of selling, for a large sum, the goodwill of their insolvent business to a joint stock company, which they caused to be formed under the Act of 1862, with limited liability. The bill then states the proceedings for forming this company, and a prospectus issued by the

(1) 1 De G. & Sm. 459.
(2) 1 Sim. 45.
(3) 5 Hare, 542; 2 Ph. 354.
(4) Law Rep. 5 Eq. 183.
(5) Law Rep. 8 Eq. 294.
(6) 7 Hare, 67.
(7) E. B. & E. 148.
(8) 37 L. J. (Ch.) 541.

V.-C. S. 1870 HILL v. LANE.

Defendants, which contained various statements alleged to be grossly false. It states, in the 17th paragraph, that the Plaintiff, relying on the truth of the statements in the prospectus, applied for forty shares in this joint stock company, and paid in respect of several calls altogether £600; that in November, 1866, an order was made to wind up the company, and various proceedings were taken under that order; and finally, an order was made by the Master of the Rolls for carrying into effect an agreement without prejudice to any proceedings which the Plaintiff might be advised to take against the directors of the company. The Defendants were directors. Various facts and figures are stated in the bill as evidence of the false statements of the Defendants, on the faith of which the Plaintiff paid his money.

In support of the demurrer to this bill, it was argued that the proper remedy for the Plaintiff, if he had any remedy, was to proceed by action at law. It has been so often decided that this Court will grant relief in such cases, that I should have overruled the demurrer without hesitation, were it not that a case of *Ogilvie* v. *Currie* was cited from the Law Journal Reports (1), said to have been decided by Lord *Cairns* when Lord Chancellor. Having examined the report of this case, it is impossible to say that it does not countenance the argument that this Court ought not to give relief on bills brought against persons to recover money paid on the faith of false representations. But this is only said in the latter part of the judgment, which deals with what seems to have been a subordinate point.

It is so well settled that this Court will entertain jurisdiction in such cases that it would be a misfortune indeed to the public if there were any sufficient ground for considering that the jurisdiction is doubtful. Lord *Eldon,* in the case of *Evans* v. *Bicknell* (2), has stated that this Court has the jurisdiction in clear and strong terms. Other great Judges have quoted Lord *Eldon's* language with approbation when enforcing the doctrine. Sir *William Grant* carried it to a great extent in the remarkable case of *Burrowes* v. *Lock* (3). In *Green* v. *Barrett* (4), Sir *John Leach* overruled a demurrer to a bill by a shareholder

(1) Vol. 37, 541.
(2) 6 Ves. 174.
(3) 10 Ves. 470.
(4) 1 Sim. 45.

to recover from directors of a joint stock company money paid on false representations. In the case of *Slim* v. *Croucher* (1) the Lord Chancellor, in affirming my decision, expressed his approbation of the doctrine, and said he should not be sorry to see it extended. Although Courts of Common Law may have jurisdiction in some such cases, there is clearly concurrent jurisdiction in this Court. Both the Lords Justices fully concurred in the views stated by the Lord Chancellor in *Slim* v. *Croucher*. So long ago as the case of *Colt* v. *Woollaston* (2), the Master of the Rolls said, "It is no objection that the parties have their remedy at law, and may bring an action for moneys had and received for the Plaintiff's own use, for in cases of fraud the Court of Equity has concurrent jurisdiction with the Common Law, matter of fraud being the great subject of relief here." In the most recent case, *Ramshire* v. *Bolton* (3), before the Vice-Chancellor *Malins*, the jurisdiction was upheld to its full extent. The demurrer must be overruled.

Solicitors for the Plaintiff: Messrs. *Carter & Bell.*

Solicitors for the Defendants: Messrs. *Wilson, Bristows, & Carpmael.*

(1) 1 D. F. & J. 518. (2) 2 P. Wms. 155, 156.
(3) Law Rep. 8 Eq. 294.

V.-C. M.

1870

Dec. 8.

CLARK *v.* HENRY.

Will—Absolute Gift at Twenty-five—Gift over on Death before Marriage—Time of Vesting.

A testator bequeathed all he should die possessed of to be equally divided between his sisters *A.* and *S.* for their sole use and benefit, to be invested in his sisters' names as they should direct; his sister *A.* (who was then over twenty-five years of age) to have the immediate control of her share, and his sister *S.* upon attaining twenty-five years, until which time it was to be held in trust for her. And in case of the death of either of his sisters before him, or before marrying and having children, the whole of the property to go to the survivor. The testator's elder sister *A.* married and had children:—

Held, that the gift over to the surviving sister, on the contingency of the death of the other before marrying and having children, was referable to such death occurring before she should attain the age of twenty-five years; and that the younger sister, on attaining twenty-five, though still unmarried, became absolutely entitled to a moiety of the property.

CAPTAIN *WILLIAM CLARK*, by his will, dated the 28th of December, 1840, which was made while he was in command of a ship in the *China* seas, gave and bequeathed all he should die possessed of in money or goods to be equally divided between his sisters *Ann* and *Sarah Clark* for their sole use and benefit. The testator then appointed his friends Captain *Kennedy* and *Joseph Henry*, and his uncle *William Clark*, to be his executors, either of them being empowered to act alone in the execution of the trusts; and he directed that all his personal property, consisting of clothes, books, plate, wines, stores of every description, musical instruments, cabin furniture, &c., should be sold by auction, and the proceeds remitted to *England* to his uncle, Mr. *W. Clark*, who would invest the same in his sisters' names as they should direct, his sister *Ann* to have the immediate control of her share (upon an equal division) of his personal property, and his sister *Sarah* upon attaining the age of twenty-five years, until which time his uncle, Mr. *W. Clark*, would hold it in trust for her; and in case of the death of either of his sisters *Sarah* or *Ann Clark* before him (the testator), or before marrying and having children of their own, the whole of the property he might die possessed of, either in money or goods, to go to the survivor.

The testator died in March, 1842, at which time his sister *Ann Clark* was about twenty-seven years of age, and *Sarah Clark* was in her twentieth year. *Ann Clark* intermarried with *J. B. Belville* in the year 1844, and had issue by him four children, all of whom were still living. *J. B. Belville* died in April, 1848. *Sarah Clark* attained her age of twenty-five in November, 1847, and was still unmarried.

This bill was filed by *Sarah Clark*, alleging that, upon the true construction of the will of Captain *W. Clark*, she became absolutely entitled, on attaining the age of twenty-five years, to the moiety of the proceeds of the testator's estate, amounting to £4202 2*s.* 10*d.*; and that the gift to the surviving sister of the testator, on the contingency of the death of the other before marrying and having children, was referable to such death occurring before she should attain the age of twenty-five years; and the bill prayed that she might be declared entitled to have the said sum of £4202 2*s.* 10*d.* transferred to her for her own absolute benefit.

Mr. *Glasse*, Q.C., and Mr. *Grenside*, for the Plaintiff:—

The intention of the testator is clear, that the property is to go equally between the two sisters upon attaining twenty-five; but if either die under twenty-five without having been married, it is to go to the survivor. The sister who had attained twenty-five was to have the immediate control over her share, and the other sister who was under twenty-five was to have the control over her share upon attaining that age. The testator, when he made his will, was abroad, and did not know whether his sisters were still living or whether they were married; therefore he used the expression, in case of the death of either of his sisters before him or before marrying.

This case is similar to *Home* v. *Pillans* (1), where there was a gift to a female, when and if she should attain twenty-one, to her sole and separate use, and in case of her death, leaving children, her share to go to her children; and it was held to vest an absolute interest in the legatee on her attaining twenty-one. Mr. *Jarman*, in his book (2), refers to the case as a "doubtful case," but he must have meant a "difficult case." It is good

(1) 2 My. & K. 15.

(2) 3rd Ed. vol. ii. p. 737.

V.-C. M. 1870 CLARK v. HENRY.

law nevertheless; and Lord *Brougham* reversed the decision of Sir *J. Leach* on the ground that the construction adopted by the Master of the Rolls was irreconcilable with the authorities, especially those in which words referring to death generally had been held to be restricted to death occurring in the lifetime of the prior legatee for life; and he adduces the case of *Yalland* v. *Leonard* (1) as an authority precisely in point. His Lordship also dwelt upon the inconvenience of holding the absolute vesting to be suspended during the life of the legatee, which was a construction the Court would never adopt but from necessity. That case was afterwards followed by Lord *Langdale* in *Monteith* v. *Nicholson* (2). The case of *Campbell* v. *Brownrigg* (3) is a leading authority upon the point that the Court will not divest an estate where it is given in the plainest terms. Here there is a distinct and positive gift, and the intention is express, and nothing that afterwards follows can affect the construction of the positive gift.

The case of *Bowers* v. *Bowers* (4), afterwards reversed on appeal (5), may be distinguished from this case, as in *Bowers* v. *Bowers* there was a gift to children; and here there is no such gift.

The case of *In re Anstice* (6) is especially valuable, because it cites *Home* v. *Pillans* (7) and *Edwards* v. *Edwards* (8), which are referred to with approbation and relied upon by the Master of the Rolls.

[The VICE-CHANCELLOR referred to *Hallifax* v. *Wilson* (9) and *In re Yates* (10), as applicable to this case.]

Mr. *Cole*, Q.C., and Mr. *Bovill*, for the Defendant *Ann Clark*, now Mrs. *Belville*:—

We do not dispute that the gift is in the first instance an absolute gift, but we say that either sister must marry and have a child before she will be entitled to retain the property absolutely. If either of them should marry and have a child thereupon the gift over of her share is impossible.

(1) 1 Sw. 161.
(2) 2 Keen, 719.
(3) 1 Ph. 301.
(4) Law Rep. 8 Eq. 283.
(5) Ibid. 5 Ch. 244.
(6) 23 Beav. 135.
(7) 2 My. & K. 15.
(8) 15 Beav. 357.
(9) 16 Ves. 168.
(10) 21 L. J. (Ch.) 281.

Mr. *Jarman* very properly alludes to the case of *Home* v. *Pillans* (1) as a doubtful case. Lord *Brougham*, in deciding it, founded his judgment upon a number of authorities in which the decisions went upon the fact that the death spoken of was death *simpliciter*, and not death upon any contingency. Where a testator directs that, in the event of death, there shall be a gift over, that is not a contingency at all, because death must happen at some time; but death without issue is a contingent event.

[The VICE-CHANCELLOR:—In the course of my professional life I have cited *Home* v. *Pillans* scores of times, and I do not remember one occasion upon which it was spoken of with disapprobation. I think it has stood the test of time remarkably well.]

The case of *Hanbury* v. *Cockerell* (2), very much resembles this. The quotation is: "And again, where a testator devised lands to his son *B.* in fee, and other lands to his son *C.* in fee, subject to a proviso that if either of his sons should die before they should be married, or before they should attain the age of twenty-one years, and without issue of their bodies, then he gave all the lands which he had given to such of his sons that should so die unto such of his said two sons as should the other survive." *Farthing* v. *Allen* (3) was referred to in *Bowers* v. *Bowers* (4), in the Appeal Court, and Lord Justice *Giffard* expressed his full approval of that decision.

[The VICE-CHANCELLOR:—And I have expressed my full disapproval of it. What I said in *Bowers* v. *Bowers* was, I should arrive at the same conclusion in the absence of authority, and if I found such cases as *Farthing* v. *Allen* in my way, I should have decided in direct contradiction.]

Yet *Farthing* v. *Allen* was considered an authority for the decision of *Bowers* v. *Bowers* by the Court of Appeal. In *Farthing* v. *Allen*, which is more fully reported in *Jarman* on Wills (5), estates

(1) 2 My. & K. 15.
(2) Quoted in Fearne's Contingent Remainders, p. 395, from Rolle's abridgment.
(3) 2 Madd. 310.
(4) Law Rep. 5 Ch. 244.
(5) 3rd Ed. vol. ii. p. 730.

V.-C. M. 1870 CLARK v. HENRY.

were devised to trustees for sale, and the produce to be divided between the son and daughter of the testator equally; and in case of the death of either of them, leaving a child or children, the trustees were to stand possessed of the property for the use and benefit of such child or children, and if either the son or daughter of the testator should die without issue, the survivor was to take; and it was held that the son and daughter were only tenants for life of the property, with such limitations over as the will contained.

The case of *Monteith* v. *Nicholson* (1), cited on the other side, is in point of fact an authority in our favour. The words of bequest in the first part of the will gave to the legatees absolute vested interests in the £500 stock. The next clause contained a limitation over, in the event of either of the legatees dying in the testator's lifetime or afterwards, to the surviving legatee, if the deceased legatee had died without issue, and to the issue of the deceased legatee if such legatee had left issue. The testator then declared that none of the legatees should be entitled to any bequest until they severally attained the age of twenty-one; and, taking all the clauses together, Lord *Langdale* was of opinion that the effect was to give an absolute vested interest to each legatee on attaining twenty-one, and the limitation over was to take effect only in the event of the death of the legatee under the age of twenty-one in the lifetime of the testator or afterwards.

There was consequently a distinct expression of intention, when all the clauses were taken together, that the interests of the legatees were to be vested at twenty-one. There was an absolute vested interest in the first place, then a divesting in case of death during the life of the testator or afterwards, and then a declaration that the interest should not vest before twenty-one.

Mr. *Cotton*, Q.C., and Mr. *Ince*, for the Defendant *Henry*, the trustee.

SIR R. MALINS, V.C.:—

The testator in this case, a seafaring man, made his will in the *China* seas. He had two sisters. It appears that, as to one of

(1) 2 Keen, 719.

them, he knew her to be of the age of twenty-five years, and as to the other he knew (at least, I think we must take it to be so) that she was under that age. He begins his will thus:—"I do hereby give and bequeath all I may die possessed of in money or goods to be equally divided between my dear sisters *Ann* and *Sarah Clark* for their sole use and benefit, independent of any one with whom they may intermarry." It is admitted by the counsel who argued in favour of the gift over that that is an absolute gift. The testator, therefore, begins with that absolute gift to his two sisters equally. Then, after giving directions as to the collection of his property, he proceeds thus: "They are to collect the property, and the proceeds to be remitted to *England* to my uncle, Mr. *William Clark*, who will invest the same in my sisters' names as they may direct, my sister *Ann* (that is the one he knew to have attained the age of twenty-five years) to have the immediate control of her share (upon an equal division) of my personal property, and my sister *Sarah* (whom he knew to be under the age of twenty-five) upon attaining the age of twenty-five years." Thereupon *Ann*, who is twenty-five years of age, is to have the immediate control of her share, and *Sarah*, upon attaining that age, is to have the control of her share.

I suppose nobody will doubt that "control" means having the property so that they may deal with it as they think fit; that is, having the absolute control over it, so that they may spend it, invest it, waste it, or do anything they like with it. Therefore, not only does the will begin with an absolute gift, but this is emphatically repeated, that they are to have the control when they attain the age of twenty-five years. The first part gives the property to them absolutely; and the second says that they are to be absolutely entitled when they attain the age of twenty-five years. Then he says: "Until which time (that is, until *Sarah* attains the age of twenty-five years) my uncle, Mr. *W. Clark*, will hold it in trust for her." Why is he only to hold it until that time? Because, upon the expiration of that time, he is to hand it over to her; until that time he is to hold it for her, meaning that when she attains the age of twenty-five years she is to have the control over it.

This is a will which, as clearly as any will which has ever been

V.-C. M. 1870 CLARK v. HENRY.

drawn, gives the absolute property to two sisters upon attaining the age of twenty-five years. So far it is admitted on all hands that, if the testator had stopped there, there would have been no difficulty. Then come the words which are said to create the difficulty: "And in case of the death"—there death is spoken of as a contingency. I agree entirely with what was said by Lord *Brougham* in the case of *Home* v. *Pillans* (1), that, inasmuch as death is an event which must happen to all at some time, that when death is spoken of as it is here, as a contingent event, it furthers the view that the testator does not mean to give it over whenever death takes place, but only in the event of death taking place within the particular period. He says: "And in case of the death of either of my sisters *Sarah* or *Ann Clark* before me, or before marrying and having children of their own, the whole of the property I may die possessed of, either in money or goods, to go to the survivor."

Now, what does he mean in this part of the will? He says: "In case of the death." Does he in these few lines mean entirely to contradict the previous part of his will? The previous part of his will is clear beyond all possibility of doubt. It is clear that they were to be absolutely entitled. That is not contested. They were also entitled to have the control of the property, or to have the property handed over to them when they attained the age of twenty-five years. Does he mean to cut them down in this way—that they are not to have the control of the property whilst they live? If that is the meaning, then neither of the sisters might have been able to receive a penny of the capital whilst they lived; and one of the sisters is now at the age of forty-eight years, and is still unmarried, and she must marry and have children before she will be entitled. What is the consequence? According to this construction neither of them could take a vested interest until they had a child; and if both were unmarried at the time of their death the event would have happened, and it would go over to the survivor. I think that is an absurd construction. Whereas, if you read it, as I apprehend it is the duty of the Court to read it, that, when you find an absolute gift at a particular period, and then a gift over in the event of death, it means in case of death taking

(1) 2 My. & K. 15.

place before that period at which the property is to become absolutely vested, then the whole will is intelligible.

I mentioned the case of *Hallifax* v. *Wilson* (1), a decision of Sir *W. Grant*, which has, I think, an important application to this case. There property was given by will to a person for life, remainder to nephews and nieces attaining twenty-one, and in case of the death of any of them before their share became payable, there was a gift over. If you adhere to the words, the share could not become payable whilst the tenant for life was alive. Some of the children attained twenty-one, and died in the lifetime of the tenant for life. It was there argued that they had not absolute interests, because it was to go over if they died before the shares became payable. They had not become payable, and therefore it was said that it was a gift over. What is the decision? Payable meant vested. Why did it mean vested? Because of the strong inclination of the Court to decide upon that broad principle that property should be made to vest as early as possible in order that it may be enjoyed. Therefore "payable" in that case meant not on the death of the tenant for life, but when the interest became vested. Consequently the child who had attained twenty-one transmitted its share to its legal personal representative.

That case was followed by a decision of Sir *James Parker* in *Re Yates' Trusts* (2). In that case it was a gift to the parents for life, and a gift over to the children at twenty-one, and a gift over in case any of them died before they became entitled to receive their shares. Now they could not be entitled to receive their shares whilst the parents were alive, because the parents were tenants for life. But Sir *James Parker* followed *Hallifax* v. *Wilson*, and said that becoming entitled to receive their shares did not mean becoming entitled to receive in possession, but having it vested, and consequently the child having attained the age of twenty-one years took the share. The question arose whether the share could be paid with the consent of the parents. The parents consented, and it having been decided that the child took a vested interest, it was taken out by her. Then as to the case of *Home* v.

(1) 16 Ves. 168.

(2) 21 L. J. (Ch.) 281.

V.-C. M. 1870 CLARK v. HENRY.

Pillans (1). It seems that Mr. *Jarman* thought that *Home* v. *Pillans* was a doubtful case. I am happy to find—indeed, I have had my attention called to it before—that the Master of the Rolls, in the case of *Edwards* v. *Edwards* (2), said that he found no difficulty about *Home* v. *Pillans*. That case is a distinct authority, and as sound a decision as was ever pronounced by any Judge, because it proceeds upon the broad principle of giving a rational interpretation to words, and making property available as early as possible. Now what is the case? The two legatees were under age. The testator gives property to them, to be transferred to them, in terms giving an absolute interest at the age of twenty-one years. Then he says that, in case of death, the property so given is to go to their children. The question was, whether it meant whenever they died at any age, or under that age at which they took vested interests. Sir *John Leach* decided that the legatees were tenants for life, and that the property was to go over whenever they died. But Lord *Brougham*, in my opinion, put a rational construction upon the words. He held that the gift over in the case of death meant in case they died before the period at which the property was to be absolutely theirs, namely, twenty-one years of age.

Mr. *Cole* said that the case of *Monteith* v. *Nicholson* (3) is a decision in his favour; but he entirely failed to convey to my mind any reason why it is so. I take it to be as clear a decision against him as could be, because upon the whole will it comes to this: The testator gives his property to several persons absolutely, to be paid at the age of twenty-one years. The interest is to vest at twenty-one, and the will concludes with this declaration: "I declare it to be my will, that none of the legatees under this my will shall be entitled to any bequest until they severally attain the age of twenty-one years." The result, therefore, is a bequest of all the property to all his brothers and sisters; but, taking the latter clause with it, at the age of twenty-one years; then there is a gift over. If they die it is given over to their children. The Master of the Rolls said: "Taking all the clauses together," (which is what I do here) "I think that the effect is to give an absolute vested interest to each legatee on attaining the age of

(1) 2 My. & K. 15. (2) 15 Beav. 357.
(3) 2 Keen, 719.

twenty-one years, and that the limitation over is to take effect only in the event of the legatee dying under the age of twenty-one years in the lifetime of the testator or afterwards."

Now, therefore, upon the same principle, taking the whole of this will together—finding, as I do, in language so distinct, first, that the sisters are to take absolutely, and secondly, that they are to have the control at the age of twenty-five years, and particularly as to this Plaintiff, who was to have her share held until she attained the age of twenty-five years, and at the end of that period the trustee was to have no more to do with it—I think I cannot have a plainer indication of the intention of the testator, that this gift over does not mean a gift over to take effect whenever the death takes place, but only in the event of its taking place before that period at which the interest was to be absolute, namely, at the age of twenty-five years. The consequence of that is, that the lady having attained the age of twenty-five years is absolutely entitled, as she asks by her bill, to have her moiety of the residue transferred to her. Mr. *Cole* said that, as the testator puts it, it applies to each of the sisters. "In case of the death of either of my sisters *Sarah* or *Ann Clark* before me, or before marrying and having children of their own, the whole of the property I may die possessed of, either in money or goods, to go to the survivor." No doubt the clause is a little too extensive. It is made to apply in terms to two when it is intended to extend to one; but it does not in the slightest degree alter the effect.

With regard to the case of *Bowers* v. *Bowers* (1), in a similar case it will be my duty, however reluctant I may be to do so, to bow to the decision of the Court of Appeal.

This is a case totally different. In that case there was a gift to the children, and the decision of Lord Justice *Giffard* certainly depends upon the fact of there being a gift to children. If there had not been a gift to the children at all, he would, as I understand, have come to the same decision as I did. In this case there is no gift to the children. Whatever construction is put upon this will the children can never take anything. It is a gift over in a limited event, and in a limited event only, and that limited event is the death of the legatees before that period at

(1) Law Rep. 8 Eq. 283; Ibid. 5 Ch. 244.

V.-C. M. 1870 CLARK v. HENRY.

which their interests were to be absolute, and they were to have the control, and to receive the money, and do as they thought fit with it. Therefore the gift over has now become impossible.

The costs will be paid out of the fund, and the remainder will be transferred to the Plaintiff.

Solicitors for the Plaintiff: Messrs. *Durnford & Co.*

Solicitors for the Defendants: Mr. *J. B. Marsden;* Messrs. *Spyer & Son.*

V.-C. M. 1870 Dec. 8.

PRICHARD *v.* PRICHARD.

Will—Words—Principal Moneys—Personal Property included.

A testator directed the income arising from his principal money to be paid to his wife, while unmarried, for the support of herself and the education of his children, and at her death or marriage to be divided among them. The testator had but little money, strictly so called, but he had large personal property, and some freehold property:—

Held, that the whole of the personal property passed, including leaseholds; but not the freehold property.

CHARLES HENRY PRICHARD, formerly a merchant at *Bristol*, made his will, dated the 27th of June, 1864, in the following terms: "I appoint *Thomas Henry Prichard* to be my executor, and I declare that the income arising from my principal money shall be paid to my wife, while unmarried, for the support of herself and the education of my children; and at her death, or on her marriage, to be divided among them. And I desire that my sisters *Charlotte* and *Jeannette*, who have so long had the charge of my mother, and have so well learned how to secure her comforts, should still continue to have care of her. As witness my hand, &c." The testator died on the 20th of December, 1869, leaving his wife and six children surviving, all of whom were under age. The property of the testator consisted of two freehold houses and a freehold rent-charge; of a considerable amount of personal property, including £36,657, the value of his share in a partnership; £3860, the value of his share in a second partnership; household furniture, valued at £2976; cash at his bankers, £239; shares in speculations

and debts owing to him, about £405; and a leasehold house in *Bristol*, valued at £268. His debts to creditors holding mortgages on his freehold property amounted to £6818, and his debts to unsecured creditors amounted to about £800.

The question raised by the bill was, whether or not the real and personal estate, or some, and what parts thereof respectively, were, upon the true construction of the will, to be deemed and taken to be included in the words "principal money" in the will contained.

Mr. *Ince*, for the executors.

Mr. *Glasse*, Q.C., and Mr. *Bird*, for the widow of the testator, claiming a share of the capital as undisposed of:—

We contend that nothing passed under the words of this will but what comes strictly within the definition of money, such as money in the testator's house and money at his bankers. In *Shelmer's Case*, cited in *Jarman* on Wills (1), it was held that, if the word "money" be used without any explanatory context, it will be considered in its strict sense. It is only where an intention is shewn to make a disposition of all the property, and that intention can only be effected by adopting an enlarged interpretation, that anything further will pass. This was distinctly laid down in *Lowe* v. *Thomas* (2), where Lord Justice *Knight Bruce* said there was a total absence of context to shew that the testatrix used the word "money" otherwise than in its correct and proper sense, which was not property generally, but a particular species of property; and he decided that stock in the funds, and other stock, was not included in the bequest of "the whole money."

In *Manning* v. *Purcell* (3) the words, "all my moneys," were held to include only a balance at the bankers and money in the hands of a stakeholder to await the decision of a bet. In that case there was a residuary clause, but there was none in *Lowe* v. *Thomas*. This case comes in every respect within the latter case.

Mr. *Cole*, Q.C., and Mr. *Sargant*, for the younger children of the testator.

(1) 3rd Ed. vol. i. p. 730.
(2) 5 D. M. & G. 315.
(3) 2 Sm. & Giff. 284; 7 D. M. & G. 55.

V.-C. M. 1870

PRICHARD v. PRICHARD.

Mr. *W. Cooper*, for the heir-at-law.

SIR R. MALINS, V.C.:—

The object must be to ascertain the intention of the testator. The word "money" will, in many instances, mean that money which a testator has in his house, or at his bankers at call; and if a man gives his ready money, or money as distinguished from other property, the Court will see what was intended to pass, as in *Manning* v. *Purcell* (1). So in this case, if the testator, after the gifts of money, had added a residuary clause, I should have said, What portion of his property did he mean when he used the term "money?" but he makes one universal gift, without distinction, and he must either have intended to die intestate or he intended by the word "money" to describe all his property. Now, it appears that he had but little money, strictly so called, though he had about £40,000 worth of personal property; he had a wife and six children, and he makes one universal disposition of the income arising from his principal moneys, to be paid to his wife, while unmarried, for the support of herself and the education of his children, and at her death or on her marriage to be divided among them. He therefore intends to bequeath capital sufficient to provide an income capable of supporting his wife and educating his children, which could not be done out of the property falling within the strict meaning of money. If he had said the income from all his property or his estate, there would have been no difficulty; and in using the words "principal money" I think he intended to signify all his capital; that is, he meant a universal disposition of all his money's worth. Consequently, I am of opinion that all his personal property of every description passed under this bequest, so that the income should be received by his wife for her support and for the education of his infant children, and after her death the capital to go to the children.

This view of the case will, I think, be found to agree with the cases which have already been decided. The only case which seems to be against it is that of *Lowe* v. *Thomas* (2), which is in

(1) 2 Sm. & Giff. 284; 7 D. M. & G. 55. (2) 5 D. M. & G. 315.

some respects in favour of Mr. *Glasse's* contention. The words there were: "To my brother, *J. Thomas*, the whole of my money for his life, at his death to be divided between my two nieces;" and the longest liver of the two nieces was to become the possessor of the whole money. The Court certainly there held that "money" was to be read in the strict sense of the word. I cannot say that I understand upon what grounds the decision was based; and if the case had been argued before me I should certainly have come to a different conclusion. There, however, the gift was of the whole of the money for life, and the capital to be divided afterwards between the nieces. Here it is a gift of the income arising from the principal money, to be applied for a particular purpose, which could only be satisfied by the whole property being included. I think, therefore, that all the testator's property passed under this clause, but not the real estate. The words cannot be extended to the real estate, because there is at all times great favour shewn by the Court to an heir-at-law, and nothing but express words will take away the inheritance from the heir; but, on the other hand, I think that the leaseholds, which appear to amount in value to about £268, will pass with the rest of the personal estate.

In this decision I agree with the case of *Dowson* v. *Gaskoin* (1), before Lord *Langdale*, where it was held that by the words "whatever remains of money" the testatrix referred to her general residuary personal estate. That decision appears to me to be founded on good sense.

Solicitors for all Parties: Messrs. *Clarke, Woodcock, & Ryland.*

(1) 2 Keen, 14.

V.-C. M.

1870

Dec. 9.

In re LEWES' TRUSTS.

Will—Presumption of Death—Burden of Proof—Residuary Legatee—Affirmative Proof of Title—Representative of Person not heard of for Seven Years.

Where a person, who is presumed to be dead from not having been heard of for seven years, is a legatee under the will of a person dying within seven years after his disappearance, the burden is upon his representative, as against the residuary legatee under the will, to prove that he survived the testator; and in the absence of proof the legacy lapses.

In re Phené's Trusts (1) followed.

JOHN LEWES, by his will, dated the 17th of December, 1858, gave his real and personal estate to trustees, upon trust to sell and convert, and to pay to each of his two sons, *Thomas Lewes* and *Price Lewes*, and each of his two daughters, legacies of £4000 a-piece; and by a codicil gave a further legacy of £250 a-piece to his son *Thomas* and each of his daughters.

The testator died on the 20th of February, 1860.

Thomas Lewes, the son, sailed from *England* for *Australia* some time in the year 1858, as midshipman and third officer on board a merchant-ship called the *Sussex*, and arrived at *Port Phillip* at the end of that year or the beginning of 1859. Immediately on his arrival he left the ship, with the knowledge of the captain, in company with a second-class passenger, who had been formerly a gold-digger, and intended to resume that occupation, and went to *Sydney*, in *New South Wales*, from which place he wrote the following letter to a cousin of his, *Thomas Vaughan*, living at *Bromellor*, in *Queensland*:—

"*White Horse Hotel, Sydney,*
"Jan. 3rd, 1859.

"My dear *John*,—I have left the ship I belonged to, and came over here two days ago. It will not do for me to stay in this town, as there is nothing to be done here at all. If you put me in the way of doing anything, I should take it as a great piece of kindness on your part. I could very soon find my way across to you. You can pretty well guess what I can do; in fact, I have no doubt better than I could tell you by letter. I should be much obliged to you

(1) Law Rep. 5 Ch. 139.

if you could write to me an answer soon, as of course my purse is not too long. They sent me a letter from *Llangeodmore*, which I forward with this. They were all very well when I saw them last, which was about a week before I left the country. Uncle had been ill just before, but he had quite recovered; in fact, the last place I saw him was at an archery meeting at *Castle Malguin*. My brother *John* is going to be married soon, I believe; at least they were talking about it before I left.

"The captain of my ship and I had a row; that was one reason why I left, but I did not run away, as I had his leave, and took my clothes with me. Hoping soon to be with you, believe me to be

"Your affectionate cousin,

"*Thomas Lewes.*

"I am staying at the *White Horse Tavern, George Street, Sydney.*"

John Vaughan was from home at the time the letter arrived, and did not receive it till a month after its date. On receiving it, however, he went at once to *Sydney*, but was unable to find *Thomas Lewes*, or hear anything about him. *John Vaughan* left *Australia* for *England* in March, 1859, but before doing so left word with all his friends to look out and make inquiries for *Thomas Lewes*.

Every possible inquiry was made, and every means of communication was made use of for a period extending over several years; but, though *Thomas Lewes* was on good terms with all his family, he was never heard of again, and could not be in any way traced; and it was admitted on both sides that no further means could be adopted for tracing him.

On the 23rd of February, 1861, the legacies of £1000 and £250 bequeathed to *Thomas Lewes* were paid into Court, where they had since accumulated.

The residuary legatee of the testator now petitioned for payment of the legacy to himself, on the ground that *Thomas Lewes* must be now presumed to be dead, and as he could not be presumed to have survived his father, the testator, the legacy must be taken to have lapsed.

Mr. *Glasse*, Q.C., and Mr. *Bagshawe*, for the Petitioner:—

The case is completely covered by authority. It cannot be

V.-C. M. 1870 *In re* Lewes' Trusts.

distinguished from *In re Phené's Trusts* (1). When once the presumption of death has arisen, the burden of proof is thrown upon those who desire to establish that the person presumed to be dead was alive at a particular period.

Mr. *Hardy*, Q.C., and Mr. *Bevir*, for the persons who would be the next of kin of *Thomas Lewes* if he had died unmarried :—

In re Phené's Trusts decided nothing new, and did not overrule the general principles on which the previous decisions had been based. The only presumption of law is, that a person who has not been heard of for seven years is dead; there is no presumption of law as to the time of death. *Thomas* v. *Thomas* (2) decided that the burden of proof was upon those to whose title it was essential that death should have taken place before a particular period; and it was so far only overruled by *In re Phené's Trusts*, that the burden is thrown upon those who desire to make out an affirmative title. *Dunn* v. *Snowden* (3) is also consistent with this view. As regards *In re Benham's Trusts* (4), the only words dissented from were, "and you must also presume that he was alive during that time." The presumption itself depends upon the circumstances of the case, the period of seven years not being universal: *Watson* v. *King* (5); *Bowden* v. *Henderson* (6); *Doe* v. *Nepean* (7). In *In re Beasney's Trusts* (8) there was evidence from which death might be inferred. Here the residuary legatee has to prove his title. The residue is just as much a gift to him as the legacy is to *Thomas Lewes*. This is not the case of bringing the legatee within a class: the residuary legatee can only take the legacy on proving the non-existence of the specific legatee. A case of next of kin is always stronger than that of a claimant under a will: *In re Green's Settlement* (9); *Underwood* v. *Wing* (10); *Dowley* v. *Winfield* (11).

[They also referred to *Lambe* v. *Orton* (12).]

(1) Law Rep. 5 Ch. 139.
(2) 2 Dr. & Sm. 298.
(3) Ibid. 201.
(4) Law Rep. 4 Eq. 416; Ibid. 5 Ch. 141, n.
(5) 1 Stark. 121.
(6) 2 Sm. & Giff. 360.
(7) 5 B. & Ad. 86; 2 M. & W. 894.
(8) Law Rep. 7 Eq. 498.
(9) Ibid. 1 Eq. 288. 1 Jan 1870
(10) 4 D. M. & G. 633; 8 H. L. C. 183.
(11) 14 Sim. 277.
(12) 6 Jur. (N.S.) 61; 8 W. R. 111

SIR R. MALINS, V.C., after shortly stating the facts, continued:—

Thomas Lewes is last heard of thirteen months before the death of his father; and the question is, whether the burden is upon the residuary legatee to prove that he pre-deceased his father, or upon the next of kin to prove the survivorship. If the burden is thrown upon the residuary legatee, it is clear that he cannot discharge it, for there is no proof of death before the 20th of February, 1860, and there is no presumption of death before that time. The presumption of law is in favour of the continuance of life, and there is no presumption of death till the expiration of seven years after the period at which the person was last heard of. On the other hand, the next of kin are equally incapable of discharging the burden of proof, if it rests upon them. The view I have taken of the question, following the decision of my distinguished predecessor, Sir *Richard Kindersley*, who on three different occasions came to the same conclusion, was that, under such circumstances, there is a presumption of continuance of life until death is shewn to have taken place; or, which is the same thing, until the rule of law applies by which it must be presumed to have taken place. If that had been the case, this young man would have been presumed to have died in 1866, and consequently to have survived his father, and his legal personal representative would take the legacy. I also thought that this view was sustained in *Doe* v. *Nepean* (1), and a long course of authority, which decided that, though there is a presumption of death at the end of seven years, there is no presumption of the precise period at which it took place. I think very great inconvenience will arise if that rule is not to be acted upon. I put a case during the argument, which brings that out very strongly. A man in a foreign land writes to a near relative on Christmas Day, 1859: "I am going on a voyage, and it may be a long voyage;" and he is never heard of again. The person to whom the letter is addressed makes his will, and dies that day week, the 1st of January, 1860, leaving him the bulk of his property. If the burden of proof is on those claiming under the missing man, the gift must fail, for it would be impossible to prove

(1) 5 B. & Ad. 86; 2 M. & W. 894.

V.-C. M. 1870 *In re* LEWES' TRUSTS.

whether a vessel starting on a six weeks' voyage foundered on the first or the last day of that period.

If the case rested on the decisions of Sir *Richard Kindersley* and myself, I should have treated the point as perfectly settled, but upon a similar point coming before the Vice-Chancellor *James,* in *In re Phené's Trusts* (1), he made an order in conformity with the decision of Sir *Richard Kindersley* and myself; but expressed his dissent from that view, and postponed the drawing up of the order to allow of an appeal, and the case accordingly went before the Lord Justice *Giffard.* I think that scientific accuracy is with his decision, but that convenience is with the decisions of Sir *Richard Kindersley* and myself, as is shewn by the present case. Young men in distant countries often become idle as regards letter-writing; and this young man might have lived for two years and not have written, and then died in the third year. I confess I thought the burden of proof was on Mr. *Glasse's* side, but I take it to be perfectly clear that that is contrary to *In re Phené's Trusts.* I invited Mr. *Hardy* to accept my decision, and to take the case to the superior Court. I think it is a case worth taking to the House of Lords; for, even if it went before the full Court of Appeal, the Court would include one Judge, Lord Justice *James,* who has already given an opinion on the question; but in the House of Lords the rule on the subject might be settled. Mr. *Hardy* has pressed upon me that *In re Phené's Trusts* is not contrary to the decisions of Sir *Richard Kindersley* and myself, but I am of the contrary opinion. In *In re Phené's Trusts* the testator left his property to his nephews and nieces, one of whom was *Nicholas Phené Mill.* The testator died in 1861. *Nicholas Phené Mill* was shewn to have been alive within a year and a half of the testator's death, and if he survived the testator he came within the class, and took a share of the property. If the presumption was in favour of the continuance of life till death was shewn, or the irresistible presumption of law arose, which it may be remarked is a statutory presumption, being recognised by Parliament in many cases, as, for instance, in the case of the law of bigamy, his personal representative took a share in the property, in accordance

(1) Law Rep. 5 Ch. 139.

with the decisions of Sir *Richard Kindersley* and myself. But Lord Justice *Giffard* came to a totally different conclusion, and there are only two or three passages to which I need refer to shew how distinctly he came to that conclusion. He says (1): "It is a general, well-founded rule that a person seeking to recover property must establish his title by affirmative proof." In the present case Mr. *Hardy* claims the property as a legatee. A legatee cannot take unless he survives the testator, and, consequently, he must establish his title by affirmative proof. Then he says (2): "The true proposition is, that those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence: the evidence will necessarily differ in different cases, but sufficient evidence there must be, or the person asserting title will fail." And, further on, in the same page: "For these reasons, and upon a review of the authorities, and the judgments on which they rest, I am of opinion that there is no presumption of law as to the particular period at which *Nicholas Phené Mill* died, that it is a matter of fact to be proved by evidence, and that the *onus* of proof rests on his representative." He comes, therefore, to the conclusion that, although *Nicholas Phené Mill* had been heard of as nearly as possible within the same period from the death of the testator as this legatee has been heard of, as there was no proof that he survived the testator, he or those claiming under him did not take a share in the fund. Now that case is precisely the case before me, and I am bound by that decision. If I were at liberty to exercise my own judgment, I should follow my own decision in *In re Benham's Trusts* (3), which, though not so strictly accurate in its principles, would, I am satisfied, work more justice than the rule in *In re Phené's Trusts* (4). Take the case of persons who sailed in the *City of Boston*, which was lost no one knows when. Rights to property may come in question as regards some of them, because continuance of life cannot be presumed till the presumption of death arises. I may even be doing the greatest injustice in this case, but I must hold that the legacy was never taken out of the residue; and that, con-

(1) Law Rep. 5 Ch. 151.
(2) Ibid. 152.
(3) Law Rep. 4 Eq. 416; Ibid. 5 Ch. 141, n.
(4) Law Rep. 5 Ch. 139.

V.-C. M. 1870 *In re* LEWES' TRUSTS.

sequently, the residuary legatee is entitled. The costs of all parties will be paid out of the fund, and the residue paid to the residuary legatee.

Solicitors: Messrs. *G. L. P. Eyre & Co.*; Messrs. *Peacock & Goddard.*

V.-C. M. 1870 *Dec.* 12.

In re DISDERI & CO.

Company—Directors—Qualification—Paid-up Shares—Agreement with Promoter to evade Liability.

A company was formed to carry on the business of *D.* The shares were of £10 each, and were to be paid up in full on acceptance. The qualification of the directors was twenty-five shares, and the directors were empowered to purchase the business for £170,000 in shares. At *D's.* request eight persons agreed to become directors on having their qualification found. They were appointed directors, and their names were entered on the register for twenty-five shares each. They then passed a resolution to buy the business for £168,000 in shares and £2000 in cash, and eight cheques were drawn on behalf of *D.* for £250 each, and one of them handed to each of the directors, who indorsed them, and handed them to the secretary, by whom they were passed on to *D.* The shares were then entered as fully paid up, and a receipt for £2000 was given by *D.*, and entered on the books of the company:—

Held, that it was necessary to the validity of the contract to purchase the business that the directors should be previously qualified; that what had occurred subsequently did not amount to payment; and that, consequently, the directors were properly on the list of contributories for unpaid shares.

THIS was an adjourned summons to strike off the list of contributories of *Disderi & Co., Limited,* the names of five gentlemen who had been placed thereon for the number of shares required for their qualification as directors.

The company was formed for the purpose of taking over and carrying on the photographic business of M. *André Adolphe Eugène Disderi,* which was carried on simultaneously in many of the capitals of *Europe.*

The memorandum and articles of association were dated the 18th of May, 1867. The memorandum was signed by seven persons for one share each. The capital of the company was £200,000, divided into 20,000 shares of £10 each.

The articles of association contained the following clauses:—

"4. No person shall be deemed to have accepted any share in the company unless he shall have applied for and accepted the same by writing under his hand, and paid thereon the sum of £10, whereupon all further liability with respect to the same will absolutely cease."

"38. The subscribers to the memorandum of association shall appoint the first directors, who shall have power, previously to the first ordinary general meeting of the company, to appoint seven other directors to act in conjunction with themselves. Such new directors shall have all the same powers and indemnities as if they had been originally named and appointed in and by these articles.

"39. The directors may purchase, on the part of the company, the photographic establishments and the goodwill in the business of M. *André Adolphe Eugène Disderi* as set forth in the memorandum of association, and may pay for the same £170,000 in 17,000 fully paid-up shares of the company, subject to the provisions of these articles of association.

"40. Every director shall, at the time of his appointment, and thenceforth during his continuance in office, hold, at the least, twenty-five shares of the company, representing £250 of capital in his own right; and if any director shall at any time cease to hold in his own right the amount of capital requisite for his qualification, his office shall thereupon immediately become vacant."

Some time after the registration of the company the five applicants were requested to become directors of the company in conjunction with three French gentlemen, and they agreed to do so on condition of having their qualification found for them, and not being required to embark any capital in the concern; and it was arranged that their qualification should be provided by M. *Disderi* out of the proceeds of the purchase of his business.

They were accordingly appointed directors, and acted as such at a board meeting of the company on the 22nd of June, 1867, one of them, Mr. *Jocelyn*, taking the chair. On that occasion they were each entered on the register for the twenty-five shares which were required for their qualification as directors. On the 25th of June, 1867, another meeting of the directors took place, at which, according to their statement, they proceeded to consider the con-

V.-C. M. 1870 *In re* Disderi & Co.

tract to purchase the business, and eventually passed a resolution to purchase it for £2000 in cash and £168,000 in fully paid-up shares. Thereupon eight cheques for £250 each were drawn upon the *Union Bank* by a Mr. *Leonard*, acting for M. *Disderi* under a power of attorney, each cheque being made payable to the order of one of the directors. The cheques were severally indorsed by the directors, and handed to the secretary of the company as the payment in full of their shares. The shares were then entered in the register as having been fully paid up, and the secretary handed the cheques back to Mr. *Leonard*, who signed and gave to the secretary a receipt for £2000. The payment of the several sums of £250 and the sum of £2000 were entered in the books of the company.

The company having been subsequently ordered to be wound up, the official liquidator placed the directors on the list of contributories for twenty-five shares each, which he treated as not having had anything paid upon them.

The five English directors now applied to be struck off the list on the ground that, as these shares were fully paid up, they were entitled to elect not to be contributories.

Mr. *Glasse*, Q.C., and Mr. *Winterbotham*, in support of the summons:—

This is not the ordinary case of a company where the shares are paid up by calls, or the capital is intended to be only partly paid up. The articles of association provide (clause 4) that there is to be no acceptance of shares till the amount due upon them is paid up. The official liquidator does not raise any question as to the validity of the contract to purchase M. *Disderi's* business, and it was perfectly competent to him to apply part of his purchase-money in paying for the shares taken by the directors. The case is similar to *Ex parte Currie* (1). The transaction is fully set out in the books of the company; and even if it can be upset as a whole, the Court has no power to vary it: *Orgill's Case* (2). If these directors are shareholders at all, they are so for fully paid-up shares, for there was by the articles of association no acceptance without payment in full, and there has been no payment except

(1) 32 L. J. (Ch.) 421; 11 W. R. 46. (2) 21 L. T. (N.S.) 221.

V.-C. M. 1870

In re DISDERI & Co.

under the arrangement with M. *Disderi*. As fully paid-up shareholders, the applicants elect not to be on the list of contributories.

Mr. *Cotton*, Q.C., and Mr. *Higgins*, for the official liquidator:—

This is an attempt to defeat the claims of creditors. The argument on behalf of the directors is the same as was brought forward in *Gray* v. *Lewis* (1). The transactions impeached by the official liquidator were the means of floating the company. Ordinarily the subscribers of the memorandum of association are the first directors of a company, but here they were only to appoint the first directors. There were no directors, and there could be no contract to purchase the business till directors were properly constituted. The applicants were placed on the register of shareholders on the 22nd of June; and the only question is, whether they had paid for their shares on that day, and that is not alleged. The shares were, at all events, paid for by the money of the company: *In re London and Provincial Starch Company*, before Vice-Chancellor *James*, April 22, 1869. The transaction is very similar to *Hunt's Case*, before the Master of the Rolls, Feb. 12, 1868. These directors must either be treated as not having paid up their shares, or as having agreed to take shares which they have not yet accepted. If a director knows that a qualification is required, and allows shares representing the qualification to be registered in his name, he is bound to take them.

Mr. *Winterbotham*, in reply:—

There is no implied contract on behalf of a director to take the shares required as a qualification: *Currie's Case* (2); *Marquis of Abercorn's Case* (3). The transaction must be taken as a whole, and the directors can only be placed on the list on condition of having the cheques returned to them.

SIR R. MALINS, V.C.:—

In this case the memorandum and articles of association are dated the 18th of April, 1867. The capital of the company con-

(1) Law Rep. 8 Eq. 526.
(2) 32 L. J. (Ch.) 421; 11 W. R. 46.
(3) 4 D. F. & J. 78.

V.-C. M. 1870 *In re* Disderi & Co

sisted of £200,000, divided into 20,000 shares of £10 each. By clause 39 of the articles of association it is provided "that the directors may purchase, on the part of the company," the business of M. *Disderi*, and "may pay for the same £170,000 in 17,000 fully paid-up shares of the company." That I read, and I suppose no one would read it otherwise, as a limit in price beyond which they are not to go. The matter seems to have languished from that date, for the company did nothing till the 22nd of June, a period of rather more than four months. During this time M. *Disderi* was going about trying to find directors. Eventually he found five gentlemen ready to hold themselves out to the public as directors. They were all men in a respectable way of life, but they all declined to incur any risk whatever. They were willing to receive fees and dividends, but under no circumstances were they to embark any capital in the company or to incur any liability. It is said that such a position is one becoming a man of honour and respectability to occupy, but I think it is inconsistent with the position of a gentleman. I think that when persons hold themselves out as directors of a company, the public have a right to infer that they have embarked their money in the concern. But if they can make themselves directors without incurring any liability, I think such a state of things would be prejudicial to the true interests of society.

It appears that the first meeting of the company took place on the 22nd of June. Mr. *Jocelyn*, one of the five English directors, took the chair, and all these gentlemen acted as directors, and their names were entered on the list for the twenty-five shares required for the qualification of each of them. On the 25th of June there was another meeting, at which they were more formally called directors, and at this meeting they signed the contract for the purchase of M. *Disderi's* business. It is obvious that no contract could bind the company till there were directors appointed, for clause 39 is express, "that the directors may purchase." It is immaterial whether they gave directions to have their names entered as directors on the 22nd or 25th of June. They were certainly so entered by the latter date, and consequently each of them became from that day liable to pay £250. Why were their names entered for the particular number of twenty-five shares?

Obviously to comply with clause 48 of the articles of association, by which that number of shares is required as the qualification for directors; and they knew that, without holding those shares, they could not act as directors. They say that these shares were part of those contracted to be given to M. *Disderi* as the consideration for the purchase of his business; but that could not be, for there was no contract to give him anything till they had taken their shares. Then these gentlemen, who were the mere creatures, dummies, and nominees of M. *Disderi*, say that at the meeting of the 25th of June they proceeded to consider the contract for the purchase of M. *Disderi's* business, for which the company was to pay £168,000 in shares and £2000 in money. Is it becoming or decent that those gentlemen should say that they have paid up their shares in full, and are therefore entitled to elect to be taken off the list of contributories?

Then the question arises whether there has been any payment upon their shares. For this another business transaction is brought forward which, I do not hesitate to say, is unworthy of a school-boy. The transfer of cheques, by which it was carried out, I can call nothing but a ridiculous farce. The transaction was, in substance, exactly like that in *Gray* v. *Lewis* (1), which I treated as a mere fraud or farce, and I should have wasted the time of the Court if I had allowed Mr. *Cotton* to go more fully into that part of the case There was another argument brought forward by Mr. *Winterbotham*, derived from clause 4 of the articles of association, which provides that shareholders shall pay up their shares in full at the time of allotment, and was to the effect that there is no acceptance of shares until payment, and if there is no payment there has been no acceptance; so that, though they had themselves required the secretary to enter the statement that their shares were paid in full, and continued to act as having done so, they are now entitled to say that they never accepted the shares. If necessary, I should have held that there was a completed agreement to take the shares; but I entirely agree that, under sect. 23 of the *Companies Act*, 1862, no agreement to take the shares was necessary. If a man acts as a director or shareholder of a company, and he is required, as a condition of so acting, to incur the liability of taking shares, he

(1) Law Rep. 8 Eq. 526.

V.-C. M. 1870 *In re* Disderi & Co.

is bound to take the shares independently of any agreement. *Levita's Case* (1), which was not cited, has a great bearing on the present case. On the whole, I think that the applicants were bound to take the shares before acting as directors, and I treat them as persons who, having agreed to take shares, have not paid them up, and they must pay them up in full. In my opinion, the case is equally clear both on principle and on authority, and they must remain on the list, and pay the costs of the application.

Solicitors: Mr. *J. B. Batten;* Messrs. *Abrahams & Roffey.*

V.-C. M. 1870 *Dec.* 20.

THAMES PLATE GLASS COMPANY *v.* LAND AND SEA TELEGRAPH COMPANY.

Company—Winding-up—Specific Performance—Leave to enforce an Answer—Companies Act, 1862, *ss.* 87, 151.

2 Ch D. 183

A vendor's suit was instituted against a company for specific performance, and an injunction obtained restraining an action to recover the deposit-money paid on the contract. Interrogatories were filed, but before the answer was put in the Defendant company was in course of voluntary winding-up under supervision. On a summons for leave to continue the suit, notwithstanding the winding-up, the Court gave leave to enforce an answer, but directed that no further proceedings should be taken without leave of the Court.

THIS was a summons adjourned into Court for leave to proceed with a suit against a company, notwithstanding an order to continue a voluntary winding-up under the supervision of the Court.

The bill, which was filed in June, 1870, was for specific performance of an alleged contract to purchase for £70,000 certain land, buildings, engines, and machinery belonging to the Plaintiff company at or near *Blackwall, Poplar.* The agreement was constituted by a memorandum of agreement under the seal of the Plaintiff company, and a letter under the seal of the Defendant company, accepting, with some variations, the proposal of the Plaintiff company, and an alleged acceptance of the variations by the Plaintiff company. The Defendant company had refused to complete, alleging the negotiations did not amount to a concluded agree-

(1) Law Rep. 5 Ch. 489.

ment between the parties. The contract, however, had proceeded so far that the Defendant company had paid a deposit on the purchase-money of £1000, which was subsequently paid into the *National Bank* in the joint names of *George Brady*, one of the solicitors, and *Alfred Goslet*, one of the directors of the Plaintiff company. The Defendant company commenced an action in the Court of Exchequer, and issued a process of attachment in the Lord Mayor's Court, for the purpose of recovering the deposit-money; and the bill prayed an injunction to restrain the prosecution of the action and process of attachment. On the 23rd of June, 1870, an order was made, upon a motion for an injunction, directing the money to be brought into Court (which was subsequently done), and restraining the action and process of attachment.

The interrogatories were filed on the 24th of June, 1870.

On the 21st of July, 1870, a resolution was passed to wind up the Defendant company voluntarily, which was duly confirmed on the 5th of August, 1870; and on the same day an order was made to continue the winding-up under the supervision of the Court, on two Petitions presented on the 1st and 8th of July respectively.

It appeared that the answer of the Defendant company had been settled by counsel before the winding-up, but not sworn.

Mr. *Cotton*, Q.C., and Mr. *Cracknall*, for the Plaintiff company:—

Unless leave is sometimes given to continue suits, notwithstanding winding-up orders, it will always be in the power of a company to evade discovery by a winding-up. It is impossible to say, till it is known what the nature of the defence is, whether a summons in the winding-up would be an equivalent for the suit. In *In re Imperial Mercantile Credit Association* v. *Witham* (1) an order was made to continue a suit notwithstanding a winding-up.

Mr. *Glasse*, Q.C., and Mr. *Kekewich*, for the Defendant company:—

The whole policy of the *Companies Act*, 1862, is to have every matter relating to a company in course of liquidation decided in the winding-up. The suit, if allowed to go on, will keep open a liqui-

(1) Law Rep. 3 Eq. 89.

V.-C. M. 1870

THAMES PLATE GLASS COMPANY v. LAND AND SEA TELEGRAPH COMPANY.

dation which is now nearly completed. The question has been already decided in *Stringer's Case* (1). An answer is, in fact, useless in the case of a company in liquidation. Every information can be obtained by affidavits, and an inspection of documents and the books of the company. *Imperial Mercantile Credit Association* v. *Witham* (2) was a suit by, not against, a company.

Mr. *Cotton*, in reply:—

It is important that the Defendant company should put in an answer which will state all the grounds of defence they rely upon, and bind them to those grounds. *Stringer's Case* is not an authority against the summons.

SIR R. MALINS, V.C.:—

I think it is in general a matter of great convenience to have all money demands brought forward in the winding-up; and, considering that a vendor's suit for specific performance amounts to no more than a mere money demand, there is much to be said for not allowing the suit to be continued. It is really no more than a money demand, for, if the contract is established, the Plaintiff company will be entitled to the £70,000, and the land will have to be sold in the winding-up, and the Plaintiff company satisfied out of the purchase-money, and they will also prove against the company for any deficiency in the proceeds of the sale to make up the amount due to them. But, though I am strongly impressed with the fact that this suit is a mere money demand, it is to be remembered that, being a suit for specific performance, it is possible that many different kinds of defence may be set up. And, considering that the bill was filed in June, 1870, and that time enough elapsed before the winding-up to have put in an answer, and no answer was put in, I am of opinion, on the whole, that the balance of convenience is in favour of allowing the suit to go on till an answer is put in. Proceedings in a winding-up have, however, the advantage over suits, in the greater expedition with which they are conducted. An appeal from an order on a summons would be heard in a week or two, while a decree in a suit would necessarily be the subject of a regular appeal.

(1) Law Rep. 4 Ch. 475. (2) Law Rep. 3 Eq. 89.

The order will be for liberty to the Plaintiff to enforce an answer in the suit if not filed within a month. No further proceedings to be taken without the leave of the Court.

Solicitors: Messrs. *Tilleard, Godden, & Holme;* Messrs. *Watkins, Baker, & Baylis.*

V.-C. M.
1870
THAMES PLATE GLASS COMPANY *v.* LAND AND SEA TELEGRAPH COMPANY.

In re SMIRTHWAITE'S TRUSTS.

V.-C. M.
1871
Jan. 13.

Trustee Act, 1850—*New Trustee—Appointment where no existing Trustee—Heir of Testator before the Court.*

The Court may appoint trustees under the *Trustee Act,* 1850, where there never have been any trustees.

A testator gave his residuary real and his personal estate to three trustees, all of whom died in his lifetime. A Petition was presented under the *Trustee Act,* 1850, for the appointment of new trustees and for a vesting order :—

Held, that all difficulty was removed by serving the heir of the testator; and that the order might be made.

DAVID SMIRTHWAITE, by his will, dated the 28th of October, 1838, gave his residuary real and his personal estate to three trustees, upon certain trusts, amongst which was a trust to sell the real estate and lay out the proceeds in the purchase of other land to be held on the same trusts. The beneficial limitations were adapted to real estate.

The three trustees named in the will died in the testator's life-time. The testator died on the 20th of September, 1870, possessed of freehold and copyhold property, as well as personal estate.

A Petition was now presented by the tenant for life and the first tenant in tail in remainder, under the limitations of the will, for the appointment of new trustees under the *Trustee Act,* 1850, and for an order vesting the real estate in them.

The person who was heir-at-law and customary heir of the testator was served.

Mr. *Casson,* in support of the Petition :—

The question whether the Court has power, under the *Trustee Act,* 1850, to make the order where there are no existing trustees,

V.-C. M. 1871 *In re* SMIRTHWAITE'S TRUSTS.

was raised in *Gunson* v. *Simpson* (1), where the order was refused solely on the ground that the heir of the testator was not before the Court. From that case it may be inferred that the Court will appoint trustees where, as in the present case, the heir has been brought before the Court.

SIR R. MALINS, V.C.:—

I think that the service of the Petition on the heir removes the difficulty felt by the Court in *Gunson* v. *Simpson*; and the order asked for may be made under the *Trustee Act*, 1850.

Solicitors: Messrs. *Pitman & Lane.*

V.-C. M. 1871 *Jan.* 13.

In re WESTBROOK'S TRUSTS.

Practice—Petition—Amendment—Facts subsequent to leave to Amend.

A Petition may be amended by stating facts which have taken place since leave to amend was given.

THIS was a Petition for payment of a sum of money out of Court.

The Petition came on for hearing on the 16th of December, 1870, when it appeared that it was necessary to have administration taken out to a person through whom five of the claimants to shares in the fund derived their interest. The Petition was accordingly ordered to stand over till the next Petition day, to enable the administration to be taken out; and leave was given to amend.

A difficulty, however, arose in adding by amendment the name of the administrator, and the fact of his having taken out administration, from a statement in *Daniell's* Chancery Practice (2), that no facts can be added to a Petition by amendment which have occurred since leave to amend was given.

Mr. *Chester*, for the Petitioner, mentioned the matter, and stated that the authorities cited in *Daniell's* Chancery Practice, in support of the statement that matters happening after leave has been given

(1) Law Rep. 5 Eq. 332. (2) 4th Ed. vol. ii. p. 1459.

to amend cannot be stated by amendment—*Maude* v. *Maude* (1) and *Re Cartwright's Trusts* (2)—did not relate to the point.

SIR R. MALINS, V.C.:—

I am of opinion that no special leave is necessary, but that the leave which I have given is sufficient to enable any amendment whatever to be made. I am surprised that it is otherwise stated in *Daniell's* Chancery Practice, which is a most carefully written book. Attention ought to be called to any error in it. However, in my view, anything whatever may be added to a Petition by amendment.

Solicitors: Messrs. *C. M. & R. C. Mote.*

(1) 5 De G. & Sm. 418. (2) 8 W. R. 492.

V.-C. B. 1870 Dec. 8, 9.

SOUTHAMPTON DOCK COMPANY *v.* SOUTHAMPTON HARBOUR AND PIER BOARD.

Jurisdiction—Account—Money Demand—Fiduciary Relationship.

Where a Court of Law can do as full justice to the subject in dispute as can be done in Equity, this Court will not interfere to stay the proceedings at law. But when the completeness of the relief at law is doubtful, and questions of account, of the right to raise a case of wilful default, and of fiduciary relationship between the parties are involved, the Court will entertain a suit for the purpose of transferring the proceedings from Law to Equity, and will grant an injunction until the hearing.

MOTION that Defendants, the *Southampton Pier and Harbour Board*, might be restrained until the hearing from prosecuting an action at law commenced by them against the Plaintiff company to recover the sum of £5000.

The Plaintiff company were incorporated by Act of Parliament, 6 Will. 4, c. 29, for the purpose of making and maintaining a dock or docks at *Southampton*. The Defendants, the *Pier and Harbour Board*, were constituted by the *Southampton Harbour Act*, 1863 (26 & 27 Vict. c. 119), with the powers, and as a continuation of and in substitution for the Pier and Harbour Commissioners, whose powers were derived from various Acts of Parliament, of which the only one material for this report is 6 & 7 Vict. c. 65. By the 53rd section of this Act it was enacted that, "for providing against any loss or diminution of income which might be sustained by the Commissioners, in case the annual income of the Commissioners arising from the rates, duties, and payments by them, taken and derived in respect of goods, wares, and merchandise, and other commodities, should, in any one year after the opening of the said dock, fall below the sum of £1000, then and in such case, and so from time to time, as the same should happen, the Plaintiff company were thereby required to pay to the Commissioners, out of the sales authorized to be taken by Plaintiff company, such annual sum as should be sufficient to make up any such deficiency as aforesaid. Such annual sum was to be computed from the 31st of March in each year, and paid and payable

K at hearing 16 W.R. Eq. 601

to the Commissioners on the 24th of June in each year; and it was also provided that it should be paid and payable in preference to the interest, dividends, and income of the moneys or stock which should be raised or created under any of the powers or provisions of that Act or the Acts therein recited, and in preference to any dividends or income payable by virtue of that Act, or by the said Acts therein recited, to the proprietors of the undertaking, or any of them; and that such annual payments and proportionable part should be paid and payable as aforesaid, notwithstanding the Commissioners should at any time reduce, alter, or vary the last-mentioned rates, rules, and sums below the rates, duties, and sums then received and taken by them on such goods, wares, and merchandise."

It appeared that, from 1847 to 1858 inclusive, there had been a deficiency in every year in the income of the *Pier and Harbour Board* or of their predecessors, but until June, 1870, no demand was made upon the *Dock Company*, and dividends had been declared, and payments made to their shareholders by that company, on the assumption that they were under no legal liability to the *Pier and Harbour Board*, or their predecessors, in respect of such deficiency.

On the 28th of June, 1870, the solicitor of the *Pier and Harbour Board* wrote to the secretary of the Plaintiff company, applying for payment of £3710 7*s.*, being the aggregate amount required for the year ending the 31st of March, 1847, and for the eleven succeeding years, to make up the income of the Port and Harbour Commissioners, in respect of goods, wares, merchandise, and other commodities, to the sum of £1000 per annum; the claim being made upon Plaintiff company under 6 & 7 Vict. c. 65. The letter called attention to the fact that the *Pier and Harbour Board* had received a peremptory mandamus, issued by the Court of Queen's Bench at the suit of the Corporation of *Southampton*, compelling them to take the necessary legal steps for obtaining payment of the sum mentioned; and the amount of deficiency that had arisen in each year (amounting during the twelve years to £3710 7*s.*) was stated.

The *Dock Company* replied that they felt bound to satisfy themselves that the income of the Commissioners referred to in sect. 53

V.-C. B. 1870

SOUTHAMPTON DOCK CO. v. SOUTHAMPTON HARBOUR AND PIER BOARD.

of 6 & 7 Vict. c. 65, had fallen short of £1000 a year, and then to consider how far they would be justified in satisfying the claim; and for this purpose they required to be furnished with detailed particulars of each year's receipts from the various sources of income authorized to be levied by the Commissioners. A statement was furnished purporting to shew a total income from the 1st of April, 1846, to the 31st of March, 1858, of £8289 13*s.*, thus falling short of £12,000 by £3710 7*s.* Some correspondence took place, in the course of which Defendants' solicitor required, as a condition to be satisfied before production of the books of the Harbour Commissioners for inspection on behalf of Plaintiff company, that Plaintiff company should admit the principle on which the demand of Defendants was based, and should limit their inquiry to an examination of the accuracy of the figures which went to make up the total of £8289 13*s.* (the total income for twelve years on goods, wares, and merchandise). On the other hand, the Plaintiff company insisted on being satisfied that the Commissioners had received and credited all the rates, duties, and payments authorized to be levied under their Acts of Parliament.

Inspection of the Commissioners' books having been refused, and an action having been commenced against the *Dock Company* by the *Pier and Harbour Board* to enforce payment of £5000, the *Dock Company* had filed the present bill to restrain such proceedings at law, and also for the purpose of ascertaining what (if any) sum was payable by Plaintiff company to Defendants by virtue of the several Acts of Parliament, and as incidental thereto, for discovery of the amount of the rates, duties, and other moneys received and taken, or which ought to have been received and taken, by Plaintiffs or their predecessors, the Commissioners, in respect of goods, wares, merchandise, and other commodities landed at or shipped from the docks and other works of Defendants or their predecessors.

The bill charged that it would be greatly prejudicial to the interests of their shareholders, and contrary to equity, that they should be required to pay out of their existing funds sums of money which ought to have been paid (if at all) in past years, and in respect of which nothing could now be recovered from the former shareholders, who, if the claim of Defendants was allowed

to prevail, would have received a larger dividend than they were entitled to.

The bill also charged that Plaintiff company were greatly disadvantaged by not having had an earlier opportunity afforded for examining the accounts of the Harbour Commissioners, and that such disadvantage afforded an additional reason why the Defendants' claim should be limited to some point of time considerably within the twenty years during which it might, but for the laches of Defendants' predecessors, otherwise be held to subsist. The Plaintiffs also charged wilful default on the part of Defendants' predecessors (in not giving any credit, in the statement of particulars sent in, in respect of any quay duty), and that, accordingly, the account ought to be taken on the footing of such wilful default.

It was also charged that, according to the true construction of 6 & 7 Vict. c. 65, s. 53, the annual income of the Harbour Commissioners, which Plaintiff company were bound to make up, was a deficiency of gross and not of net income; but that Defendants had in their account computed the deficiency on the assumption that the latter construction was the true one, and had made allowances in their own favour for all outgoings of every description in connection with the management of the harbours, piers, and quays, and the levying of tolls and duties thereat.

Declarations were prayed—1. That the deficiency of income which, by the 6 & 7 Vict. c. 65, s. 53, Plaintiff company were bound to make good to Defendants, was a deficiency of gross and not of net income. 2. That for the purpose of estimating the amount of such income (whether gross or net), and of ascertaining the extent of the aforesaid deficiency (if any), the *Board* ought to give credit for all sums which their predecessors, the Harbour Commissioners, might have received, or but for wilful default might have received, in respect of duties leviable on goods, wares, merchandise, and commodities landed or shipped from any of the legal quays in *Southampton*, or for which a quay duty was chargeable in addition to pier duty. 3. That the *Board* were debarred in equity from requiring Plaintiff company to make good any deficiency of income which might have occurred previously to 1870, down to which time no demand was made upon Plaintiff

V.-C. B. 1870

SOUTHAMPTON DOCK CO. v. SOUTHAMPTON HARBOUR AND PIER BOARD.

company in respect of such deficiency, and dividends were declared by Plaintiff company, and paid to their shareholders, on the assumption that no liability to make good such deficiency in fact existed.

The bill also prayed an account, on the footing of the above declarations, of what (if anything) was due and owing to the *Board* from Plaintiff company under 6 & 7 Vict. c. 65, and 26 & 27 Vict. c. 119, Plaintiffs thereby offering to pay to Defendants what should so be found due. An injunction in the meantime against prosecution of the action at law, and an inspection of the books and documents in the possession of Defendants, were also prayed.

The Plaintiff company now moved for an injunction in restraint of the proceedings at law.

Sir *Roundell Palmer*, Q.C., Mr. *Kay*, Q.C., and Mr. *Cookson*, in support of the motion, cited *South Eastern Railway Company* v. *Brogden* (1).

Mr. *Eddis*, Q.C., and Mr. *E. Cutler*, for the Defendants:—

There is no ground for staying proceedings in the action, as complete justice can be done in a Court of Law, and there is no single element in the case which renders it one for a Court of Equity in preference to a Court of Law. There is not that mutuality of account, by receipts and payments by each party on account of the other, or complication, which is necessary to support the bill: *Phillips* v. *Phillips* (2); *Fluker* v. *Taylor* (3); *Foley* v. *Hill* (4); *O'Mahony* v. *Dickson* (5). No fiduciary relationship has been made between the parties. There is a mere legal right to receive and obligation to pay, which give no right to an account in equity: *Smith* v. *Leveaux* (6); *Moxon* v. *Bright* (7).

In *South Eastern Railway Company* v. *Brogden* there were many very special and complicated matters of account which could not be decided upon by a jury with justice to parties. But here no such complication exists. With respect to laches, though no demand was made upon the Plaintiffs, they must have known of

(1) 3 Mac. & G. 8.
(2) 9 Hare, 471.
(3) 3 Drew. 183.
(4) 2 H. L. C. 28.
(5) 2 Sch. & Lef. 400.
(6) 2 D. J. & S. 1.
(7) Law Rep. 4 Ch. 292.

their liability to Defendants, whose accounts, as a public body, were audited and circulated in the town, and also from the proceedings at Common Law and before the House of Lords, which resulted in the issue of a writ of mandamus compelling the Defendants to sue the Plaintiffs. But even if there has been laches on the part of the Defendants, a Court of Common Law can deal with that question: *Chitty's* General Practice (1); and no laches by the creditor, in failing to demand payment of these annual deficiencies, will destroy the liability of the Plaintiffs as debtors: *Rex* v. *Carpenter* (2); *Reg.* v. *Parish of St. Michael, Southampton* (3). Any equitable defence to the action that the Plaintiffs have, may be pleaded by them at law.

Mr. *Kay*, in reply:—

We shew, as grounds for the interference of this Court, mutuality, complication of account, and a fiduciary relationship between the parties. The accounts must be taken on both sides to shew, on the one hand, that there has been a deficiency, and, on the other, that our receipts are sufficient to justify us in making up that loss; and, in taking that account, we are entitled to raise the case of wilful default. On these grounds a sufficient case for the intervention of equity has been shewn. There has not been merely laches on the part of the Defendants—they have suffered us to act on the belief that no claim would be made upon us, and this course of conduct amounts, in the contemplation of a Court of Equity, to a fraudulent misrepresentation. As to an equitable defence, by way of plea, being open to us in the action at law, we are not bound to plead such equitable defence, but may come into Equity for relief: *Kerr* on Injunctions (4), and the cases there cited.

[On the question of constructive notice of the deficiency, *Daniels* v. *Davison* was cited (5).]

SIR JAMES BACON, V.C.:—

The single question on this motion is, whether the Plaintiffs have a right to sustain their bill in this Court. The cases which

(1) Vol. i. p. 785.
(2) 6 A. & E. 794.
(3) 6 E. & B. 807.
(4) Page 25.
(5) 16 Ves. 249; 17 Ves. 433.

V.-C. B. 1870

SOUTHAMPTON DOCK CO. v. SOUTHAMPTON HARBOUR AND PIER BOARD.

have been referred to, from *Fluker* v. *Taylor* (1) to *South Eastern Railway Company* v. *Brogden* (2), have established as a very plain principle that it is not in every case of account that this Court will interfere to withdraw from the jurisdiction of a Court of Common Law the subject-matter of dispute between the parties. They all, I think, establish this proposition, that where it is unquestionable that the Court of Law can do as full justice to the subject in dispute as can be done in this Court, this Court will not interfere. If there be any doubt about that, the Plaintiff has a right, as I conceive, to maintain his suit in this Court.

The declaration in this case states the Acts of Parliament, and it states in detail that account which is set out in the bill, and declares upon each of the items of that account. The Plaintiffs at law sue for each of those sums, making in the aggregate £3710.

The circumstances under which the claim arises are these: The Defendants are now entitled, and before the formation of these docks were still more extensively entitled, to certain quay dues. The first Act of Parliament which recognised their right in that respect is affected and altered by 6 & 7 Vict. c. 65, s. 53, which is set out in the bill. [His Honour referred to that section.] Now what is the consequence of that? To the extent of this sum, which is in dispute between the parties, the Defendants, who were the persons to manage the fund coming to their hands, were surely bound in all good husbandry and fairness to receive all that they could be entitled to receive. That seems to me to raise a case, if not strictly of trusteeship, yet so nearly approaching to it that the Plaintiffs in this suit have a right to hold the Defendants to the strict exercise of their powers and their duties, and to the observance of perfectly good faith between them; because, if it were not so, it would be in the power of the Defendants, for any reasons, good or bad, to forbear from receiving that which they might have received, or which, perhaps, they could not receive without difficulty, and have recourse to the Plaintiffs to make up the deficiency of the £1000. It is only the deficiency that the Defendants are entitled to claim against the Plaintiffs. That proposition seems at once to shew that it is incumbent upon the Defendants to shew

(1) 3 Drew. 183. (2) 3 Mac. & G. 8.

actually what they have received, and entitles the Plaintiffs in this suit to insist upon what they might, but for their wilful default, have received. That is not an account which could be conveniently taken in a Court of Law. Nor is the principle of such an account as that, at all affected by any of the cases cited on behalf of the Defendants, which establish a most wholesome and safe principle, because, as was said by Lord Justice *Turner* in more than one case, the doors of this Court would otherwise be opened to every case of disputed demands between parties. Then, I think, the Plaintiffs have a right to have strictly examined in this Court, and upon principles applicable to the administration of this Court, the whole of the receipts by the Defendants, for the purpose of ascertaining what the deficiency amounted to. Included in that is the account relating to the pier. The Defendants have two rights. They have a right, as owners of the pier, to receive something in the way of profit—no matter what; and they have a right also to the quay dues. They have let these things to some person, it being more convenient, as I suppose, that they should be rented by a lessee than that they should be exacted and received by the officers of the Defendants' company. The affidavit by no means meets that case. The affidavit states, in general terms, that what they have received for the rates is included in the account upon which they have declared, and which is set forth in the bill. Surely that is a matter as to which the Plaintiffs have a right to an investigation. They have a right to know whether the quay dues, which were, as the Defendants say, let by them, were let at a fair and proper rate, and how can that be examined into properly in a Court of Law? If it should turn out that the quay dues have been let for less than they were worth, and if the Plaintiffs shew that there has been any default in the fair and due management of the property so let, they will have a remedy against the Defendants. Whether they will do so or not remains yet to be seen; and the only difficulty and reluctance which I feel in dealing with the case is, that I am compelled in some measure to pronounce an opinion upon something which is not yet ripe for decision, in order to decide the question which is submitted to me. The questions I have adverted to must be decided when this cause comes to be heard. There is the other

V.-C. B. 1870

SOUTHAMPTON DOCK CO. v. SOUTHAMPTON HARBOUR AND PIER BOARD.

question which has been mentioned, namely, the fact that for all these years, from 1847 to 1858, the Defendants might, if there were any deficiency, have claimed it. There could have been no difficulty if they kept their accounts properly. They made no claim whatever until a very recent period. During that time what was the duty of the Plaintiffs? They were under no obligation to go to the Defendants, and say: "Have you any demand against us on the subject of this deficiency?" They are living in the same town—that does not signify; but it is a fact that exists, and the Defendants, having similar interests no doubt in a great many matters, and having full knowledge of a great many circumstances which must bear upon this, make no demand whatever, nor any suggestion that they had any demand to make. What were the Plaintiffs then to do? Nobody can say it was incumbent upon them to go and ascertain whether anything was claimed. If they had done so, the same right of investigating the accounts would have existed. But they were under no obligation; and, I think, in all fairness, it cannot be said that they improperly did or omitted anything. What their legal rights may be in consequence, is a question to be decided. Whether they did anything which was unfair or improper in concluding in each and every year that this account comprises, that no claim whatever could be made against them, and that the fund they had in hand was free for them to distribute and divide in the manner authorized by Act of Parliament, subject only to the claim which the Defendant company might have made and did not make, is a question which, until the cause comes to be heard, and the facts come to be known, and the inquiries properly made, it is impossible to decide. It is not, in my opinion, a case affected by *Rex* v. *Carpenter* (1) and *Reg.* v. *Parish of St. Michael, Southampton* (2), because in those cases, as was pointed out, there was no doubt whatever about the liability to pay or the amount to be paid. Here the very doubt was, whether there would be anything to pay or not, because it was only the deficiency that was to be paid, and there was no one who could say that there was a deficiency but the parties who now claim £3710, the aggregate for those years. I cannot perceive that those cases, therefore, have the slightest bearing upon the case now before me.

(1) 6 A. & E. 794. (2) 6 E. & B. 807.

No doubt a Court of Common Law is as competent as any other Court to decide a question of laches properly brought before it, and undoubtedly there has been laches, for the Defendants, who were entitled to demand this money and knew what was due to them, never did demand it. In this case there are several questions of importance, purely equitable questions, which have to be decided at the hearing of this cause. It is impossible to deny that the Plaintiffs have a right to raise that equitable question, upon which they rely, whether by reason of the conduct which the Defendant company has pursued, the Plaintiffs are not absolved from the necessity of making any payment in respect of those years, ending with the year 1859. Whether an equitable plea might be framed to that, I will not inquire. I am by no means convinced that any equitable plea which a Court of Common Law would entertain could have been framed under these circumstances, but whether it could or could not, the existence of such an equitable ground as that is a reason why the matter should be continued in this Court, and why it should be withdrawn from a Court of Common Law. I conceive, therefore, that the Plaintiffs are entitled to maintain the suit in this Court. They are entitled to maintain it because they have suggested certain grounds of equitable relief, to which they may be entitled, and which, as I conceive, the Court of Common Law could not extend to them, or could not extend to them with anything like convenience. There has been no demurrer to the bill. A reason, indeed, for not demurring has been suggested as furnished by the charge in the bill, that the annual income of the Harbour Commissioners, which the Plaintiffs are bound to make up, is a deficiency of gross and not of net income, and that, as charged, this is a matter involving great complication. But the very suggestion of that reason shews that there may be a ground arising out of that particular part of the case, which entitles the Plaintiffs to have the accounts investigated with the utmost rigour.

There must be an injunction upon the terms of giving judgment in the action to be dealt with as this Court shall direct, and the proceedings in this Court must go on.

Solicitors: Mr. *H. S. Smith*, for Messrs. *Sharp, Harrison, & Pocock, Southampton*; Messrs. *Abbott, Jenkins, & Abbott*, for Mr. *Hickman, Southampton.*

V.-C. B.
1871
Jan. 20.

SAVAGE *v.* SNELL.

Practice—Special Case—Amendment.

Upon the birth, after a special case has been set down for hearing, of an infant tenant in tail, the proper course for bringing such necessary party before the Court is, that the order for setting down should be discharged, and the special case amended by making the infant a party.

A SPECIAL case had been set down for hearing, but before it came on to be heard an infant tenant in tail of the property in question was born.

Mr. *Haddan* applied *ex parte* as to the course to be pursued for bringing the infant, who was a necessary party, before the Court, and stated that in *Palmer* v. *Flower* (1) Vice-Chancellor *James* had directed a supplemental statement to be filed, but the case of *Thistlethwaite* v. *Garnier* (2) was not cited to him; and submitted, on the authority of that case, and the cases collected in *Daniell's* Chancery Practice (3), that parties could not be properly added to a special case by a supplemental statement, but that the proper course was to discharge the original order for setting down, and amend the case by making the infant a party.

Sir James Bacon, V.C., following *Thistlethwaite* v. *Garnier*, ordered that the order to set down the original case should be discharged; that the case should be amended by adding the infant tenant in tail as a party, on which the usual appearance for the infant and fresh appearances for all the present parties should be entered; and then leave of the Court should be obtained to set down the case again for hearing, and restore it to its original place in the paper.

Solicitors: Messrs. *Surr & Gribble.*

(1) 18 W. R. 887. (2) 5 De G. & Sm. 73.
(3) 4th Ed. p. 1403.

TYLER *v.* YATES.

V.-C. S.
1870
Nov. 11, 12, 13.

Usurious Contract—Unconscionable Bargain—Reversionary Interest—31 & 32 Vict. c. 4.

The jurisdiction of this Court over unconscionable bargains is not affected by the repeal of the usury laws, or by the 31 & 32 Vict. c. 4, as to dealings with reversionary interests.

An exorbitant rate of interest agreed to be paid by a young and needy man on the security of property in reversion, held by an indefeasible title, is unfair dealing within the 31 & 32 Vict. c. 4.

Where a young man charged his reversionary interest with exorbitant sums for interest on loans principally made to his brother, an infant, the Court decreed the charge to stand as security only for the sums actually advanced, and for interest at £5 per cent.

THE Plaintiff, who is the assignee in bankruptcy of the late Lord *Arthur Pelham Clinton*, filed this bill against *Frederick Yates* and *John Campbell Dicker*, and prayed (briefly) as follows:—

1. That it might be declared that the charges and memoranda in the bill mentioned were only securities for the sums actually advanced by the Defendants, or either of them, to Lord *Arthur Pelham Clinton*, with interest at £4 per cent.

2. That an account might be taken of all moneys actually advanced by the Defendants, or either of them, to Lord *Arthur Pelham Clinton*, on the security of his reversionary interest, or which they had a right to charge against such interest.

3. That the said reversionary interest might be sold, and that out of the proceeds the moneys found due on such accounts, with interest at £4 per cent. from the date of the advance, might be paid to the Defendants.

4. That in the meanwhile the Defendants might be restrained from negotiating, parting with, or disposing of the said charges and memoranda.

Lord *Arthur* was made a Defendant, but no relief was prayed against him.

The bill stated that on the marriage of the Earl and Countess of *Lincoln* a sum of £30,000 was settled upon the wife for life, with a power of appointment among the children, and that by a deed dated the 25th of September, 1852, the Earl and Countess of *Lincoln*

V.-C. S. 1870 TYLER v. YATES.

appointed the fund equally among their four younger children, viz., Lord *E. W. Pelham Clinton*, Lady *Susan C. C. Pelham Clinton*, Lord *Arthur* and Lord *Albert Pelham Clinton*. The Earl of *Lincoln*, then Duke of *Newcastle*, died in October, 1864, and the Countess, who had been divorced from her husband, was still living.

The bill then alleged that *Dicker* was a money-lender, carrying on business at 10, *Craig's Court, Charing Cross*. That *Yates* was formerly a solicitor, but had caused his name to be removed from the roll, and now carried on business as a money-lender and bill discounter at 74, *Harley Street, Cavendish Square*. That although not ostensibly in partnership, *Dicker* and *Yates* "were in the habit of operating and negotiating together in loan and bill discounting arrangements, and of dividing the profits of their highly remunerative transactions between themselves. In the transactions in question they acted conjointly as if they were partners." That *Dicker* caused to be inserted in various public journals, the following notice :—

"Money.—Money advanced at a few hours' notice, on the most advantageous terms, to noblemen, officers in the army, heirs to entailed estates, and gentlemen of property, on their personal security, also on security of reversions to landed estates at £5 per cent., payment of which may be deferred until possession, on application to Mr. *Dicker*, 10, *Craig's Court, Charing Cross, S.W.*"

The bill alleged that by these advertisements *Dicker's* name became known to Lord *Albert*, and that that led to the transactions now in question.

The bill then stated a series of transactions, which were generally to the effect that Lord *Arthur* was induced to give a number of bills of exchange in order to obtain loans of money, of which, however, none but a few very small sums were really advanced. Lord *Arthur*, in his answer, supported the allegations in the bill, but after the answers of the Defendants had been filed, and the evidence had, in fact, been taken, Lord *Arthur*, in an affidavit made on behalf of the Plaintiff on the 23rd of February, 1870, deposed as follows :—

"Speaking to the best of my recollection, I am not now prepared to deny the truth of the statements contained in the first twenty-

four paragraphs in the answer of *J. C. Dicker*. When the bill of complaint in this suit was filed, I read it, and then thought the statements therein contained were correct, but I have since then seen the answer of the other Defendants, and copies of some letters which have passed between the Defendant *Dicker* and myself in the early part of the year 1866, and I think I must, at the date of the filing of the bill, have been under a misapprehension as to the way in which I was induced to accept the several bills of exchange referred to in the said bill of complaint."

In consequence of this affidavit the charges of fraud were abandoned, and the case was presented to the Court on the facts admitted in the answers of *Dicker* and *Yates*, and the results of their cross-examination.

Dicker, in his answer, stated that Lord *Albert* was introduced to him by Mr. *Wilbraham* in July, 1864, when the two gentlemen requested him to discount a bill of exchange, dated the 22nd of July, 1864, for £600, payable three months after date, drawn by *Wilbraham* and accepted by Lord *Albert*. *Wilbraham* fixed the commission. *Dicker* applied to *Yates* to discount the bill, which he did, giving *Dicker* £520, being the amount less discount, as agreed to by *Wilbraham;* and on the 25th of July, 1864, *Dicker* handed *Wilbraham* £480, for which he sent a receipt. Lord *Albert* was born in 1845, and was then a minor. The bill was not paid at maturity. In February, 1866, Lord *Albert* called on *Dicker* in consequence of a letter he had received from him about the £600 bill, to know if he could raise money for him on bills of exchange; *Dicker* said his being under age was an objection, but perhaps he could do so if they were accepted by a person of full age. Lord *Albert* said his brother (born in 1840) was of full age and an M.P., and he would ask him to accept bills for him, and he at the same time requested *Dicker* to ascertain if he could get such bills discounted. *Dicker* then applied to *Yates*, who stated that he was willing to discount such bills, but that if he did so he would require *Wilbraham's* bill for £600 to be provided for. On the 26th of February, 1866, Lord *Albert* called on *Dicker*, when he informed him that he could raise the money on these bills, but that the discounter required the former bill for £600 to be taken up. The terms were then discussed, and the amount of the commission

V.C. S. 1870 TYLER v. YATES.

fixed, and Lord *Albert* directed *Dicker* to take up the £600 bill and to pay the interest for sixteen months. Two bills were then drawn by Lord *Albert* upon, and accepted by, Lord *Arthur*, payable three months after date. They were as follows:—Bill for £1500, dated the 26th of February, 1866; bill for £500, dated the 26th of February, 1866. Before they were discounted, *Dicker* had lent Lord *Albert* two sums of £50 and £100, which were to be repaid out of the discount of the bills.

Yates discounted the £1500 bill. The account was as follows:—

	£
Yates' discount	150
Bill of July, 1864	600
Interest thereon	100
Loan by *Dicker*	150
Dicker's commission	75
Bill stamp	1
Cash paid by *Dicker* to Lord *Albert* . .	424
	£1500

Lord *Albert* gave the following receipt:—

"£424. *London*, March 1, 1866.

"Received of Mr. *Dicker* the sum of £424, being, together with the sums of £50 received on February 26, 1866, and £100 received on February 28, 1866, and a bill of exchange for £600, dated July 22, 1864, drawn and indorsed by *A. B. Wilbraham*, and accepted by me at three months and now given up to me, the consideration as agreed for my bill of exchange for £1500, dated February 26, 1866, drawn on, and accepted by, Lord *Arthur P. Clinton*, and payable three months after date, allowing for interest on said overdue bill of £600 the sum of £100, for discount £150, and for Mr. *Dicker's* commission £75, as agreed, and bill stamps owing, £1.

"*A. Clinton.*"

On the 6th of March, 1866, *Dicker* obtained from *Yates* a discount of the bill for £500, as follows: "*Yates* paid *Dicker* £425; *Dicker* remitted to Lord *Albert*, who was then at *Homburg*, £300, and Lord *Albert* drew a cheque on *Dicker* for £20." And on the 12th of March, 1866, *Dicker* paid to Lord *Albert* a further sum of

£79 11s., which, with 9s. telegraph, amounted in the whole to the sum of £400 received by Lord *Albert*, for which he gave receipts.

On the 15th of March, 1866, Lord *Albert* applied to *Dicker* to discount a bill for £500, payable three months after date, drawn by Lord *Albert* upon Lord *Arthur*, and accepted by the latter, and dated the 15th of March, 1866. After some negotiation *Dicker* consented to do so on the bill being altered to two months. The following sums were paid:—

	£
On the 23rd of March, 1866	50
„ 27th „ „	50
„ 28th „ „	100
„ 9th of April, „	150
	£350

This sum of £350, with £150, the discount agreed on, made £500.

On the 28th of April, 1866, Lord *Albert*, accompanied by his brother Lord *Arthur*, applied to *Dicker* to discount a bill for £500, drawn by Lord *Albert* and accepted by Lord *Arthur*, as before. The discount and commission were agreed to, and the following sums paid to Lord *Albert*:—

28th April, 1866.	Paid to Lord *Albert*	£400
	Discount . .	75
	Commission .	25
		£500

A receipt for these sums was given by Lord *Albert*.

Dicker subsequently got the bill discounted by *Yates*, and paid him £75 as agreed. On the 28th of April *Dicker* said that he could not sign the letter which Lord *Albert* had sent undertaking to renew the bill. The letter, which was in Lord *Arthur's* handwriting, was as follows:—

"My Lord,—I shall have pleasure in acceding to your request —viz., to renew your bill, if required by you to do so, to the extent of twelve months, so as to keep it in strict confidence and not handed about to be seen by any one."

(Signed.)

V.-C. S. 1870 TYLER v. YATES.

Dicker also required security for the £500 bill. Lord *Arthur* thereupon gave him a charge, dated the 28th of April, on his interest in the £30,000 subject to his mother's life estate.

On the 7th of May, 1866, Lord *Arthur* wrote to *Dicker* the following letter, which was relied on by the Plaintiff, as shewing the pressure he was under for money. It was written on paper stamped "House of Commons." The material part was as follows:—

"I am in bed with a bad cold at a friend's house, or would call and see you myself about a great favour—viz., this, I lost rather heavily last week, and am very much pressed for £200. I must pay £100 to-day by 3.30 P.M., and the other £100 by same time to-morrow. This is really the honest truth. Now, if you could do this for me I should be ever grateful, and would give a bill to you at three months for £250. I should not require to renew it unless you wished it so. If you will grant me this favour, may I ask you kindly to send by bearer a bill for me to sign, and if you could trust me a £100 cheque with it, the other £100 would do to-morrow. I am asking you, I know, to do this on my own name, but I will give you my word of honour it shall be paid at maturity. If, therefore, my honour is sufficient for you, pray do it as asked, and you will relieve me of great anxiety and do me an ever-to-be-remembered favour. Trusting for an affirmative answer, believe me to remain,

"Yours, very truly,

"*Arthur Pelham Clinton.*"

Upon receipt of this note, Mr. *Dicker* sent Lord *Arthur*, by the bearer of his letter, a cheque for £100, and a draft for £250, payable three months after date, which he returned to him, the draft accepted, with a letter, of which the following is a copy:—

"Monday.

"Private.—Dear Mr. *Dicker*,—How can I thank you sufficiently for so promptly acceding to my request? You have relieved me of a great anxiety. I return the bill accepted.

"Believe me, hoping soon to see you, very truly yours,

"*Arthur Pelham Clinton.*

"P.S.—Please do not mention this to my brother *Albert*."

Dicker sent the other £100, making £200, which, with £50 discount, made £250.

"Tuesday.

"My dear Mr. *Dicker*,—Pray accept my sincere and grateful thanks for your kindness in sending the two cheques, both of which I have received, and

"Believe me to remain, yours sincerely,

"*Arthur Pelham Clinton.*"

On the 15th of May, *Dicker* agreed to discount a similar bill for £500, and paid Lord *Albert* £100 out of £300 which he was to advance, and on the same day Lord *Arthur* gave *Dicker* a charge, dated the 15th of May, on his reversionary interest. On the same occasion Lord *Albert* and Lord *Arthur* requested *Dicker* to hold over for two months the bill for £500, dated the 15th of March, 1866; Lord *Albert* gave directions as to the discount, and *Dicker* applied to one *William Skinner*, who gave him £450, and *Dicker* gave him the charge of the 15th of May, 1866.

On the 19th of May, 1866, *Dicker* gave Lord *Albert* £200 for the bill dated the 15th of May.

On the 25th of May, 1866, Lord *Arthur* called on *Dicker*, who told him he should like to have some security for the bill of £250, whereupon he gave *Dicker* a charge on his reversionary interest, in the same form as before, dated the 25th of May, 1866, and with it a letter in the following terms:—

"Dear Sir,—Excepting the mortgages I have given you to secure the bills discounted with and through you, I have not in any way charged or incumbered my reversionary interest in the £30,000 settled at my father and mother's marriage on myself and brothers and sister.

"Yours faithfully,

"*Arthur P. Clinton.*"

The two bills for £1500 and £500, dated the 26th of February, 1866, became due on the 29th of May, when Lord *Albert*, accompanied by Lord *Arthur*, applied to *Dicker* to discount two bills for £2000 and £1800, drawn as before, payable seven months after date. On the 13th of June, *Dicker* gave Lord *Albert* £50 on the said bills. The bills were discounted as follows: *Yates* gave up to *Dicker* the

V.-C. S. 1870 TYLER v YATES.

bills for £1500 and £500, and the sum of £350 cash, making a total of £2850, the balance, £950, being retained for discount and to meet the bill for £500, dated the 28th of April, which would not become due till the 31st of July, 1866. Of the £350 cash paid by *Yates*, *Dicker* handed to Lord *Albert* £103 5*s*., which, with £50 previously advanced, £2 for bill stamps, £4 15*s*. for stamps on the charges, and £190, the commission on the discount of the two bills, made up the sum of £350. On the 22nd of June, 1866, *Dicker* discounted Lord *Arthur's* acceptance for £25, retaining £5 for discount, and on the 21st of July *Dicker* lent Lord *Arthur* £10 on taking his acceptance for £12 10*s*. On the 10th of August, 1866, at Lord *Arthur* and Lord *Albert's* request, *Dicker* consented to hold over the bill dated the 15th of March, 1866, for five months on receiving their promissory note for £500. The note was subsequently discounted through *Dicker* by *Skinner*, who charged £66 for interest, and £66 interest for holding the bill over for five months. *Dicker's* commission was, discounting, £68, for renewal £50, total £118. The balance was retained by *Dicker* for holding over the bill as agreed. On the 16th of August, 1866, Lord *Arthur* created a charge on the reversionary property to secure the £500 bill. On the 10th of August the bill of the 7th of May was renewed by *Dicker* in exchange for a £300 bill, dated the 10th of August, 1866, payable three months after date, and a charge was given on Lord *Arthur's* reversionary property.

The Defendants, in their answer, denied any collusion or partnership. Notice was duly given of the charges to the trustees of the settlement. On the 12th of November, 1868, Lord *Arthur* was adjudicated a bankrupt on his own Petition.

On the 3rd of April, 1869, this bill was filed.

The amount for which *Dicker* had charges on Lord *Arthur's* property was £800, and on the 26th of August, 1869, his solicitor offered to assign his charges thereon on being paid £550, the amount actually advanced, and £4 per cent. interest thereon from the 18th of December, 1866. This offer was declined.

Yates had obtained judgment against Lord *Arthur* on the bills. The amount of his claim was £3800. He also, before the hearing, had offered to take the amount of money actually advanced by himself, with interest at £4 or £5 per cent. This also was refused.

Mr. *Karslake*, Q.C., and Mr. *Cooper Willis*, for the Plaintiff:—

The charges of fraud are withdrawn, but the facts proved and admitted shew a still clearer ground for the interposition of this Court.

Lord *Arthur*, except as to a small sum of £210, was induced to become surety for his brother, Lord *Albert*, an infant, who borrowed the money, as the Defendants well knew, for gambling transactions. Such a suretyship was clearly, in the eye of this Court, null and void.

The VICE-CHANCELLOR:—Unless you shew me some authority for that, I must hold that, at all events to the extent of the money advanced, Lord *Arthur's* estate is liable.

Mr. *Karslake*:—Independently of that ground, the evidence discloses the most unconscionable dealing and the most exorbitant amounts charged for interest. This brings the case clearly within the principle of *Croft* v. *Graham* (1), in which, on appeal, the Lords Justices would hardly listen to the argument that the repeal of the Usury Acts had made any alteration of the law as to these unconscionable bargains.

Mr. *Dickinson*, Q.C., and Mr. *F. T. White*, for the Defendant *Dicker*:—

The law has undergone a change. Formerly, interest charged above a fixed amount was illegal; but now a trader in money, like a trader in other things, is at liberty to demand, and receive if he can get it, £100 per cent. profit. Had the transaction not gone beyond the loan on bills of exchange, the Defendant could legally enforce, and, in fact, has legally enforced it, for he has obtained judgment at law on the bills. It is clear, therefore, that at law there is no objection to the rate of interest taken by the Defendant *Dicker* on the bills.

Then as to the security. Before the alteration of the law it was enough to shew that the security was reversionary in order to invalidate a transaction of this kind. That was the case in *Croft* v. *Graham* and all that class of cases, which, therefore, do not apply to this case.

(1) 2 D. J. & S. 155; S. C. 5 Giff. 1.

V.-C. S. 1870 TYLER v. YATES.

upon unconscionable terms can only stand good for money actually advanced, with interest at £5 per cent.

The argument for the Defendants, that the debt was constituted before the charge was created, is of no avail. If the debt is constituted in such a way that it is composed of items unconscionable and exorbitant, it can make no difference whether the debt was so constituted before the security was taken or after.

The case of *Webster* v. *Cook* (1) was decided upon a mistake, and therefore cannot be looked upon as a case of authority. In that case Lord *Chelmsford* conceived that the interest in question was not a reversionary interest. There is no conceivable difference upon principle between the interest which the owner of an estate has in an annuity paid to a widow by way of jointure, which interest is to accrue on the death of the widow, and any other reversionary interest. The case of *Webster* v. *Cook* is not consistent with the established doctrines of this Court.

In this case the Plaintiff has, to my satisfaction, clearly established his right to equitable relief. That relief, I think, must be upon the footing that the Plaintiff must make good to the Defendants, *Yates* and *Dicker*, all moneys actually advanced, either to Lord *Albert* or to Lord *Arthur*. During the argument I stated my view why that should be done. Where money is advanced upon the faith of a representation that it would be paid by another, the money having been paid on the faith of that representation, he is bound to make good the representation. But he is not bound to the extent of exorbitant or unconscionable discount.

The question of costs must be disposed of with reference to all the circumstances of the case, and the mode in which the litigation has been conducted. In the case of *Miller* v. *Cook* (2), as in other cases of the same kind, relief having been given upon the footing of redemption, and the Plaintiff coming to get rid of his own act, the Defendant's costs were added to his security. That is upon a very plain principle. Generally speaking, if a man comes to redeem, he must pay the costs of redemption; and if a man comes to get rid of his own deliberate act, he must also, generally speaking, pay the costs of his own folly in being obliged to come and ask the Court to undo what he has deliberately done.

(1) Law Rep. 2 Ch. 542. (2) Law Rep. 10 Eq. 641.

In the present case there are in the bill charges of fraud which the Plaintiff does not insist upon. This is a case in which the assignee of the party creating the charge, who is Plaintiff in the cause, comes to be relieved against the folly and indiscretion of the bankrupt; therefore I can see no right on his part to the costs of the suit as against the Defendants. It appears that a very considerable sum was offered by the Defendant *Dicker* to be taken off from the amount of the charge, and he agreed to accept that reduced sum, with interest at £5 per cent. That is a great modification of his demand, and is a circumstance which affects the question of costs; and the proper order for the Court to make, in this extraordinary case, as to costs, seems to me to be that neither party should have any costs of the suit; that the Plaintiff and Defendants should, up to and including the decree, bear their own costs of the suit. The decree will therefore be for an account of all moneys advanced by the Defendant *Dicker* to Lord *Arthur Clinton*, or Lord *Albert Clinton*, in the transactions mentioned in the pleadings.

As to directing an account of advances by *Yates*, I do not see that *Yates* made any advance except through *Dicker*, and I do not see that any good would ensue from directing an account of advances by *Yates*, inasmuch as all his advances were made through *Dicker*. It might raise a question as to commission; but that cannot arise on these grounds: it has been argued that *Dicker* was the agent of Lord *Arthur;* but, upon the evidence, *Dicker* was as much the agent of *Yates*. He was the go-between in a transaction of discount at exorbitant interest. Both as to *Yates* and *Dicker* there is this fact involved in the principle on which relief is given, that the value of this reversionary interest was perfectly clear, and both *Yates* and *Dicker* knew that if Lord *Arthur* had taken it into the open market he could have obtained money on it at the ordinary rate of interest. I think, therefore, that it is sufficient to direct an account of all moneys actually advanced by *Dicker* to Lord *Arthur* and Lord *Albert*, or to their order, or for their use, as in the pleadings mentioned, prefacing this order by a declaration that the charge is to stand good only for the sums actually advanced. I have only named *Dicker* in the account, because it is admitted that *Yates* never saw either of these gentlemen, and all the advances took place through *Dicker*.

V.-C. S. 1870 TYLER v. YATES.

upon unconscionable terms can only stand good for money actually advanced, with interest at £5 per cent.

The argument for the Defendants, that the debt was constituted before the charge was created, is of no avail. If the debt is constituted in such a way that it is composed of items unconscionable and exorbitant, it can make no difference whether the debt was so constituted before the security was taken or after.

The case of *Webster* v. *Cook* (1) was decided upon a mistake, and therefore cannot be looked upon as a case of authority. In that case Lord *Chelmsford* conceived that the interest in question was not a reversionary interest. There is no conceivable difference upon principle between the interest which the owner of an estate has in an annuity paid to a widow by way of jointure, which interest is to accrue on the death of the widow, and any other reversionary interest. The case of *Webster* v. *Cook* is not consistent with the established doctrines of this Court.

In this case the Plaintiff has, to my satisfaction, clearly established his right to equitable relief. That relief, I think, must be upon the footing that the Plaintiff must make good to the Defendants, *Yates* and *Dicker*, all moneys actually advanced, either to Lord *Albert* or to Lord *Arthur*. During the argument I stated my view why that should be done. Where money is advanced upon the faith of a representation that it would be paid by another, the money having been paid on the faith of that representation, he is bound to make good the representation. But he is not bound to the extent of exorbitant or unconscionable discount.

The question of costs must be disposed of with reference to all the circumstances of the case, and the mode in which the litigation has been conducted. In the case of *Miller* v. *Cook* (2), as in other cases of the same kind, relief having been given upon the footing of redemption, and the Plaintiff coming to get rid of his own act, the Defendant's costs were added to his security. That is upon a very plain principle. Generally speaking, if a man comes to redeem, he must pay the costs of redemption; and if a man comes to get rid of his own deliberate act, he must also, generally speaking, pay the costs of his own folly in being obliged to come and ask the Court to undo what he has deliberately done.

(1) Law Rep. 2 Ch. 542. (2) Law Rep. 10 Eq. 641.

In the present case there are in the bill charges of fraud which the Plaintiff does not insist upon. This is a case in which the assignee of the party creating the charge, who is Plaintiff in the cause, comes to be relieved against the folly and indiscretion of the bankrupt; therefore I can see no right on his part to the costs of the suit as against the Defendants. It appears that a very considerable sum was offered by the Defendant *Dicker* to be taken off from the amount of the charge, and he agreed to accept that reduced sum, with interest at £5 per cent. That is a great modification of his demand, and is a circumstance which affects the question of costs; and the proper order for the Court to make, in this extraordinary case, as to costs, seems to me to be that neither party should have any costs of the suit; that the Plaintiff and Defendants should, up to and including the decree, bear their own costs of the suit. The decree will therefore be for an account of all moneys advanced by the Defendant *Dicker* to Lord *Arthur Clinton*, or Lord *Albert Clinton*, in the transactions mentioned in the pleadings.

As to directing an account of advances by *Yates*, I do not see that *Yates* made any advance except through *Dicker*, and I do not see that any good would ensue from directing an account of advances by *Yates*, inasmuch as all his advances were made through *Dicker*. It might raise a question as to commission; but that cannot arise on these grounds: it has been argued that *Dicker* was the agent of Lord *Arthur;* but, upon the evidence, *Dicker* was as much the agent of *Yates*. He was the go-between in a transaction of discount at exorbitant interest. Both as to *Yates* and *Dicker* there is this fact involved in the principle on which relief is given, that the value of this reversionary interest was perfectly clear, and both *Yates* and *Dicker* knew that if Lord *Arthur* had taken it into the open market he could have obtained money on it at the ordinary rate of interest. I think, therefore, that it is sufficient to direct an account of all moneys actually advanced by *Dicker* to Lord *Arthur* and Lord *Albert*, or to their order, or for their use, as in the pleadings mentioned, prefacing this order by a declaration that the charge is to stand good only for the sums actually advanced. I have only named *Dicker* in the account, because it is admitted that *Yates* never saw either of these gentlemen, and all the advances took place through *Dicker*.

V.-C. S. 1870 TYLER v. YATES.

Mr. *Dickinson* was subsequently heard as to the costs, and cited *Wilde* v. *Gibson* (1) and *Miller* v. *Cook* (2); but the Vice-Chancellor adhered to his decision as to the costs.

MINUTES:—Declare that the several charges are to stand as a security in the hands of the Defendant *John Campbell Dicker* for all moneys actually paid or advanced by *J. C. Dicker* to or for the use of the late Defendant *Arthur Clinton* and the Hon. *Albert Clinton*, or either of them, upon the bills of exchange in the said charges mentioned, or upon any bills of exchange for which such bills were given in renewal respectively, together with interest thereon at the rate of £5 per cent. per annum, and order and decree that an account be taken of such advances on the footing of the above declaration. Usual redemption decree on the same footing. Perpetual injunction to restrain the Defendants, or either of them, from negotiating, parting with, or disposing of the said charges, or any of them. No costs to the hearing to either party. Liberty to all parties to apply as to sale of reversionary property, and generally.

Solicitor for the Plaintiff: Mr. *W. H. Roberts.*
Solicitors for the Defendant *Yates:* Messrs. *Marshall & Turner.*
Solicitors for the Defendant *Dicker:* Messrs. *Dalston & Son.*

(1) 1 H. L. C. 605. (2) Law Rep. 10 Eq. 641.

BOWER *v.* SMITH.

M. R.
1871
Jan. 26.

Marriage Settlement—Covenant to settle after-acquired Property.

A marriage settlement contained a covenant that if, during the coverture, the wife should become entitled to any property of the value of £500 or upwards, it should be vested in the trustees upon the trusts of the settlement. After the marriage a sum of £5499 19*s.* 1*d.* was bequeathed upon such trusts as the wife should appoint. She executed eleven successive deeds, several of them on the same day, by each of which she appointed £499 19*s.* 11*d.* for her own separate use :—

Held, that the money in question was not bound by the covenant in the settlement, and that the wife was entitled to the whole.

BY a settlement made on the marriage of *Henry* and *Elizabeth Robinson* it was agreed that if the said *Elizabeth Robinson* then was, or if during the intended coverture she or *H. Robinson* in her right should become, seised, possessed of, or entitled to any real or personal property of the value of £500 or upwards, from any estate or interest whatsoever (except certain chattels therein mentioned), then and in every such case the said *H. Robinson* and *Elizabeth Robinson*, and all other necessary parties, should assign and assure the said real or personal property to, or otherwise cause the same to be vested in, the trustees of the settlement upon the trusts thereby declared.

William Gilliat, the father of *Elizabeth Robinson*, by a codicil to his will, executed after her marriage, after reciting that it was his intention that what he gave to her should be for her absolute use, and not subject to the trusts of the settlement, bequeathed to his trustees a share of the residue of his estate upon such trusts, to and for such ends, intents and purposes, and in such manner as the said *Elizabeth Robinson* should, notwithstanding her coverture, appoint.(1)

The share amounted to £5499 19*s.* 1*d.* In order to entitle herself to receive this sum free from the covenant contained in the settlement, *Elizabeth Robinson* executed eleven deeds-poll, dated on successive days, but some of them being in fact executed on the same day, and by each of the said deeds she appointed that £499 19*s.* 11*d.*, part of the said share, should be in trust for her

(1) The will contained a gift over in default of appointment.

M. R. 1871 BOWER v. SMITH.

the said *Elizabeth Robinson*, her executors, administrators, and assigns, for her and their separate use.

The suit was instituted by the surviving trustee of the will, to obtain the declaration of the Court on the question, whether the sum of £5499 19*s.* 1*d.* was or was not bound by the covenant to settle after-acquired property exceeding in value £500.

Mr. *Jessel*, Q.C., and Mr. *Bagshawe*, for the Plaintiff.

Sir *R. Baggallay*, Q.C., Mr. *Southgate*, Q.C., Mr. *Stevens*, Mr. *Wickens*, Mr. *Langworthy*, Mr. *Medd*, and Mr. *Owen*, for the several Defendants.

LORD ROMILLY, M.R., considered that Mrs. *Robinson* was entitled to the whole fund, as the deeds of appointment, by each of which she appointed a less sum than £500 for her separate use, could not have been executed simultaneously, and the fact of several of them being executed on the same day could make no difference.

Solicitors: Messrs. *Palmer, Eland, & Nettleship;* Messrs. *Young, Maples, & Co.*

M. R. 1871 *Feb.* 8.

ATTREE *v.* ATTREE.

Will—Gift of "all the rest"—Real Estate.

Testatrix, after a gift of her house and garden (which were leasehold, though not so described) and several pecuniary legacies, directed that "all the rest" should be divided between the persons in her will named:—

Held, that the words included realty as well as personalty.

36 L.J. Ch. 766.

ANN TOURLE ATTREE, by her will, made in 1861, after certain pecuniary legacies, gave the house and garden called *Underwood* "to *Georgiana Crompton*," and after several other pecuniary legacies, she proceeded as follows: "And all the rest to be divided between the daughters of *Frank Tourle Attree*." She appointed no executors.

The house and garden mentioned in the will were of leasehold tenure. The suit was instituted by the Plaintiff, who was the only daughter of *Frank Tourle Attree*, for the administration of the real and personal estate of the testatrix; and the question arose,

on further consideration, whether freehold and copyhold estates to which the testatrix was entitled at the time of her death passed under the will.

Mr. *Jessel*, Q.C., and Mr. *Freeman*, for the Plaintiff:—

The words of the residuary gift, "all the rest," are sufficient to pass real estate. Even in ancient times, the Courts gave a very wide interpretation to similar terms. Thus, in *Huxtep* v. *Brooman* (1), under the words, "all I am worth," real as well as personal estate was held to pass.

The case of *Bebb* v. *Penoyre* (2) may be cited on the other side, where a testator ordered the lease of his house to be sold, and "all the rest and residue" to be divided amongst the four daughters of his brother; and it was held that the words were confined to personal estate. But that decision rested on the ground that the residue was intended to be divided by his executors, and Lord *Ellenborough* observed: "The words 'rest and residue,' in the place in which they stand in this will, and so accompanied, must mean property of a similar nature to the lease of the house before mentioned, that is, his personal estate."

In *Wilce* v. *Wilce* (3) the words "everything else I die possessed of," associated with gifts of personalty, was held to carry real estate. So, in *Re Greenwich Hospital Improvement Act* (4), where a testator made the following gift to his wife, "all my leases, moneys, goods, furniture, plate, book debts, securities for money, and all other property of every description that I may be possessed of at the time of my decease," it was held that the real estate passed.

The question here is, what is to be supplied with the words "all the rest?" We submit that, as there is nothing to limit the gift to personal estate, and as there is no principle that can be applied in favour of the heir-at-law, the word "real" as well as "personal" estate must be supplied.

Sir *R. Baggallay*, Q.C., and Mr. *Balmer*, for the Defendant, the heir-at-law:—

There are two classes of cases where real estate, though not

(1) 1 Bro. C. C 437.
(2) 11 East, 160, 164.
(3) 7 Bing. 664.
(4) 20 Beav. 458.

M. R. 1871 ATTREE v. ATTREE.

specifically referred to, is held to pass; first, such cases as *Huxtep* v. *Brooman* (1), where the words "all I am worth" clearly point to estates of any kind; or as *Davenport* v. *Coltman* (2), where the generality of the words, "whatever I may die possessed of," were held to include real estate; and secondly, cases where, at the commencement of a will, as in *Wilce* v. *Wilce* (3), the testator expresses an intention of disposing of his property of every kind.

But where, after a variety of different dispositions, you find such words as "all the rest," then you must look to see what those dispositions are, and the words must be regarded as *ejusdem generis*. In the present will, the words "all the rest" follow gifts of personalty, therefore they must be taken to mean "all the rest of my personal estate." Besides, it is "to be divided," a direction more applicable to personalty than to realty.

Mr. *Winterbotham*, for the next of kin.

LORD ROMILLY, M.R.:—

I am of opinion that the words "all the rest" include all the rest of the property, real as well as personal. The testatrix here gives a house and garden which are leasehold, and various legacies, and then deals with "all the rest." If she had instructed any one to prepare her will, and had directed that, after certain bequests, "all the rest" should be given to the persons named, she would naturally be understood to mean all the rest of her property, of whatever kind. There will be a declaration that her real estate passed under the will.

Solicitors: Messrs. *Senior, Attree, & Johnson*, agents for Messrs. *Husey-Hunt, Currey, & Co., Lewes;* Messrs. *Doyle & Edwards*, agents for Mr. *H. T. Lovegrove, Gloucester.*

(1) 1 Bro. C. C. 437. (2) 12 Sim. 588.
(3) 7 Bing. 664.

INGHAM *v.* WASKETT.

M. R.
1871
Feb. 16.

*Practice—Order of Revivor and Supplement after Decree—*15 & 16 *Vict. c.* 86, *s.* 52.

In a foreclosure suit, in which four mortgagees were Plaintiffs, after decree and before the Chief Clerk's certificate, the Plaintiffs transferred the mortgage to three of themselves and a new mortgagee.

On an *ex parte* application by the three continuing mortgagees and the new mortgagee, with the consent of the other original mortgagee, an order of revivor and supplement was made under 15 & 16 Vict. c. 86, s. 52.

THIS was a suit for foreclosure by four joint mortgagees. After the common decree directing an account of what was due to the Plaintiffs, and payment or foreclosure, and before the Chief Clerk's certificate, in pursuance of the decree, had been made, the four mortgagees transferred the mortgage to three of themselves and a new mortgagee.

Mr. *Marten*, for the three continuing mortgagees and the new mortgagee, and with the consent of the other original mortgagee, applied *ex parte* for an order, under the 15 & 16 Vict. c. 86, s. 52, to carry on the decree as a decree for an account of what was due to the present mortgagees, and for payment or foreclosure thereupon, similar to the form in *Seton* on Decrees (1).

He cited *Freeman* v. *Pennington* (2), *Colyer* v. *Colyer* (3), *Mallock* v. *Still* (4), *Hobson* v. *Shearwood* (5), and *Vibart* v. *Vibart* (6). A similar order had been made under the corresponding Irish Act in *North British Mercantile Assurance Company* v. *Burke* (7). Accounts which were merely incident to revivor might be included in the common order: *Williamson* v. *Jefferys* (8).

LORD ROMILLY, M.R.:—

The Lords Justices seem to have gone as far as I am asked to

(1) Page 403, Form No. 3.
(2) 3 D. F. & J. 295.
(3) Law Rep. 1 Ch. 482.
(4) 15 W. R. 293.
(5) 15 W. R. 887.
(6) 16 Ibid. 997.
(7) 17 Ibid. 22.
(8) 12 Ibid. 403.

M. R. 1871 INGHAM v. WASKETT.

go. You may take the order. But it must be at your peril, and without prejudice to what I may do on an application to set aside the order.

Solicitors: Messrs. *Davidsons, Carr, & Bannister.*

M. R. 1870 *July* 8; 1871 *Jan.* 27, 31.

7 Ch 692

MINET *v.* MORGAN.

Practice—Production of Documents—Common of Vicinage—Title-deeds.

The Plaintiff filed a bill to establish a right of common of vicinage over a common within a manor of which the Defendant was lord. By his answer, the Defendant denied the Plaintiff's right:—

Held, that the Plaintiff was entitled (1) to production of the records of, and documents relating to, Court Barons held within the manor; (2) to the production of accounts and memoranda relating to the digging of gravel and cutting of turf on the common; (3) to have a list of the documents relating to the title of the Defendant as lord of the manor; but (4) not to have such documents produced, the Defendant stating by affidavit that they related exclusively to his own title as lord of the manor, and did not in any way tend either to establish the rights claimed by the Plaintiff or to defeat the Defendant's defence to the suit.

THE Plaintiff was the owner of a manor and lands situate in *Kent*, known as the *Baldwyn's* estate. The Defendant was the lord of the manor of *Dartford* in that county, and as such the owner of a common, called *Dartford Heath*, on which the Plaintiff's lands abutted.

The object of the suit was to establish the right of the Plaintiff, as owner of the *Baldwyn's* estate, to common of vicinage over *Dartford Heath*.

The Defendant, by his answer, filed on the 26th of April, 1870, denied the Plaintiff's right to common over the heath; and in answer to an interrogatory as to documents, stated that he had in his possession divers ancient and other documents connected with the manor of *Dartford*, and relating to the heath, which documents comprised deeds and evidences of title to the manor and the heath, records of Courts held in and for the manor, maps, rentals, and rent accounts of the manor, and accounts of turf, gravel, and loam cut, dug, removed and sold from the heath by the lords of the manor; and he denied that the said documents, or any of them,

evidenced the existence or the exercise of the rights claimed by the Plaintiff in his bill.

By an affidavit as to documents filed on the same day, the Defendant deposed that he had in his possession the documents relating to the matters in question in the suit mentioned in the first and second schedules thereto; those in the first schedule being records of, and documents relating to, proceedings at Courts Leet and Courts Baron held for the manor of *Dartford*; and those in the second schedule comprising accounts of moneys received for gravel, turf, &c., taken from *Dartford Heath*, and letters and memoranda relating to the digging and taking of such gravel and turf; and the Defendant thereby objected to produce the documents in the first schedule, because they related solely to the manor of *Dartford* and to the titles of land within or held of the same, and the rights and duties of tenants of the manor, and the Plaintiff did not claim to be a tenant; and he also objected to produce the documents in the second schedule because they were private documents belonging to the Defendant as owner of *Dartford Heath*, and no one not holding a right of common over the heath was entitled to production thereof; and the Plaintiff had not established such right, which was denied by the Defendant's answer.

On the 14th of June, 1870, the Plaintiff took out a summons, calling on the Defendant to produce the documents mentioned in the schedules to the affidavit, and also to make a further affidavit stating whether he had in his possession any and what ancient documents connected with the manor, and relating to the heath, or any and what deeds and evidences of title to the manor and heath, or any and what records of Courts held in and for the manor, or any and what maps of the manor.

Sir *R. Baggallay*, Q.C., and Mr. *Kekewich*, in support of the application, cited *Warrick* v. *Queen's College* (1) and *Noel* v. *Noel* (2).

Mr. *H. S. Milman*, *contrà*, cited *Lett* v. *Parry* (3), *Wright* v. *Pitt* (4), and *Bolton* v. *Corporation of Liverpool* (5).

(1) Law Rep. 3 Eq. 683.
(2) 1 D. J. & S. 468.
(3) 1 H. & M. 517.
(4) Law Rep. 3 Ch. 809.
(5) 3 Sim. 467.

M. R. 1870 MINET v. MORGAN.

LORD ROMILLY, M.R.:—

I think a little confusion has arisen with respect to the doctrine on which this Court requires the production of documents and title-deeds, and it is necessary to distinguish between two cases. If a Plaintiff comes into this Court and says: "I am the owner of *Whiteacre*, the legal estate is outstanding; I cannot possibly bring an ejectment, and I am entitled to have *Whiteacre* conveyed to me, who am the real owner," he cannot compel the Defendant to produce his title-deeds, and this Court will assist the latter in every respect, and say to the Plaintiff, "You cannot look at one of his title-deeds until you have got a decree in your favour." Accordingly, here, if the Plaintiff claimed to be lord of the manor, and came and asked the Defendant for the production of the deeds which establish his right to be lord of the manor, I would not allow a single deed to be produced, or anything whatever of that description to be shewn, until the Plaintiff had established that he was the lord of the manor. It is a very different thing, however, when a man comes and says: "There is a privity between me and the Defendant; I am his tenant. I do not dispute that he is lord of the manor, but he is asserting rights which are inconsistent with those of the tenants, and therefore I am entitled to have produced all the documents in your possession which shew in what manner you have exercised your rights and in what manner they may affect or benefit me." The question is, whether the allegations of this bill bring the case within this statement. The Plaintiff admits that he does not claim to be a tenant of the manor; he is, therefore, not entitled to any common appendant by right of law. But there are in the English law two different sorts of rights of common, one being the right of common appendant and the other being the right of common appurtenant. The right of common appendant depends upon being tenant of the manor and having a right in respect of the tenement held of the manor. The right of common appurtenant depends upon a grant from the lord, and includes common of vicinage; accordingly, if an adjoining owner has from time immemorial enjoyed a right of pasture over the lord's common, that will belong to that particular property as to which there has been exercised that right from time immemorial, and the Court will assume that there has been a grant from the original lord enabling the owner of that property, in respect of that right, to

have the common of pasturage. Accordingly, I think the Plaintiff is entitled to look at the documents for the purpose of seeing whether there are facts to bring out that result, not at all disputing the lord's title, not at all disputing the title of any other tenant. It may appear from the documents that a small rent, for instance, has been paid by the owner of the property to the lord of the manor of *Dartford* for the purpose of exercising the right of pasturage over the land; and if so, he is entitled to see them. It is not that he is claiming to take away property from him, but it is in respect of the right, which is a very possible one, which he alleges, and he alleges that the Defendant has in his possession documents which may establish that fact. I am of opinion that in that respect the Plaintiff is entitled to the discovery which he seeks, and that he must have it.

An order, dated the 8th of July, 1870, was accordingly made for production of documents, and for a further affidavit, as asked by the summons.

In obedience to the order of the 8th of July, 1870, the Defendant filed an affidavit on the 19th of December, 1870, in the schedule to which he set out a list of the documents in his possession relating to the manor of *Dartford;* but he objected to produce such documents, on the ground that they related to the matter in question in the suit only as being parts of his title to the manor, but no one of them related to the Plaintiff's property, or the alleged right in respect of which the bill was filed, or tended in any way to make out the Plaintiff's title to such property, or such alleged right, or any other right or interest supporting, or tending to support, the Plaintiff's claims, or to defeat in any way the Defendant's defence to the suit.

The Plaintiff thereupon took out a summons, calling on the Defendant to produce the documents mentioned in the schedule to the affidavit of the 19th of December, 1870. This summons was adjourned into Court.

Jan. 27. Sir *R. Baggallay*, Q.C., and Mr. *Kekewich*, for the Plaintiffs:— 1871

The matter is concluded by the judgment on the former appli-

M. R. 1871 MINET v. MORGAN.

cation; and the Defendant ought to produce these documents. It is true he says they only relate to his own title; but he may be mistaken, and the Plaintiff ought to have an opportunity of judging as to that: *Noel* v. *Noel* (1).

Mr. *Jessel*, Q.C., and Mr. *Charles Hall*, for the Defendant:—

This is not a case of a freehold tenant of the manor claiming a right of common. The Plaintiff is an utter stranger to the manor, and there is no privity whatever between him and the Defendant. Under these circumstances the Plaintiff cannot have production of the Defendant's title-deeds any more than if he claimed to be entitled to a field belonging to the Defendant: *Combe* v. *Corporation of London* (2).

Sir *R. Baggallay*, in reply.

Jan. 31. LORD ROMILLY, M.R.:—

This is a motion for the production of certain papers. Upon reading and considering carefully the form of the affidavit which has been made, I am of opinion the Defendant is not bound to produce the papers. I am of opinion he was bound to set out a list of them, and I agree with what I said upon a former occasion, which was to the effect that there was a distinction between the common appendant and common appurtenant for the purpose of production; but for the purpose of giving an account of what documents the parties had, I did not think there was any distinction between them at all. A person who has common appurtenant does not claim it as a tenant of the manor; there is no privity between him and the lord in that respect; and in order to have the lord's documents actually produced, he must either shew that the right he claims has been actually exercised for a long period, or that the documents would tend to establish his claim. Now I do not find upon the present occasion that either of these propositions is admitted; I am therefore of opinion that this is like a man claiming a right of way over another man's land, over which

(1) 1 D. J. & S. 468. (2) 1 Y. & C. Ch. 631.

he has not as yet established any foundation to such right at all. Although he may have, under the circumstances, laid a foundation for production of a list of the documents, I think he cannot have the production of the documents themselves for inspection until he establishes that he has that right. Therefore I shall refuse the motion for production of the documents upon the present occasion.

Solicitors: Messrs. *Dawes & Sons;* Messrs. *Carlisle & Ordell.*

V.-C. S.
1871
Jan. 27.

HALL *v.* HALL.

Contempt of Defendant—Costs of Plaintiff—Discharge from Custody—Suitors' Fund—Courts of Justice (Salaries and Funds) Act, 1869 (32 & 33 *Vict.* c. 91)—*Practice.*

On motion on behalf of a pauper Defendant in contempt, that he may be discharged from custody, the Court has no authority, under the *Courts of Justice (Salaries and Funds) Act*, 1869, to order the costs of the Plaintiff, upon his own application, to be provided for by the Treasury.

THE Defendant, *Edwin Hall*, a pauper, was, on the 11th of January, 1871, brought to the Bar of the Court for contempt in not putting in his answer to the Plaintiff's bill in this cause, and was, upon undertaking to put in an answer within fourteen days, turned over to *Holloway Prison.*

Mr. *Method* now moved that the prisoner be ordered to be discharged from custody, he having put in his answer.

Mr. *Morshead*, for the Plaintiff:—

Under the old practice the Defendant would have been detained in custody until the Plaintiff's costs had been paid out of the Suitors' Fund. The Court had power to order that the costs of any such prisoner should be paid out of that fund: 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, r. 7; 23 & 24 Vict. c. 149, s. 6; *Daniell's* Chancery Practice (1); and the Plaintiff's costs ought to be provided for before the Defendant be discharged from custody. Now, inasmuch as the Suitors' Fund has been by the *Courts of Justice (Salaries and Funds) Act*, 1869 (32 & 33 Vict. c. 91), transferred to the National Debt Commissioners, the Treasury is liable, and must provide for these costs; and therefore it is submitted that the proper course will be to order the Defendant to pay the Plaintiff's costs, and then to leave him to obtain them over from the Treasury under the provisions of sect. 13, sch. 3, part 2, of the recent statute.

Mr. *Method*:—The statutes 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, and the 23 & 24 Vict. c. 149, s. 6, were passed for the relief of

(1) 4th Ed. p. 461; 5th Ed. p. 427.

Defendants, and no such order as that asked for can be made upon the application of the Plaintiff: *Ward* v. *Woodcock* (1); *Watkin* v. *Parker* (2). The only application on the part of the Defendant now is, simply that he be discharged from custody. The *Debtors Act*, 1869 (32 & 33 Vict. c. 62), will prevent the Defendant being detained in custody for the non-payment of costs.

Mr. *Morshead*:—It may be admitted that the application that the payment of the Plaintiff's costs should be provided for ought to be made on behalf of the Defendant; and it ought to be made by him, otherwise a great hardship may be inflicted upon the Plaintiff.

The VICE-CHANCELLOR:—If such an application be not made by the Defendant, I do not think I can order the Plaintiff's costs to be provided for by the Treasury.

Mr. *Morshead*:—In that case I would ask for an order similar to that made in *Bennett* v. *Chudleigh* (3), where the costs incurred by means of the contempt and of the application to discharge were reserved: or that the Plaintiff's costs might be made costs in the cause.

SIR JOHN STUART, V.C.:—

No application has been made on the part of the Defendant as to the payment of any costs; and there seems to be no authority, under the *Courts of Justice (Salaries and Funds) Act*, 1869, s. 13, to order payment of the Plaintiff's costs; nor would it be proper to make an order similar to that made in the case of *Bennett* v. *Chudleigh*, where the Defendant undertook to abide by such order as to costs, and otherwise, as the Court should think fit. To make the Plaintiff's costs costs in the cause might result in their being paid by the wrong person.

The order will simply be, that the prisoner be discharged from custody on putting in his answer.

Solicitors: Mr. *J. J. Johnson*, Solicitor to the Suitors' Fund; Mr. *M. K. Braund*.

(1) 5 L. T. (N.S.) 816. (2) 1 My. & Cr. 370.
(3) 2 Y. & C. Ch. 164.

V.-C M.
1870
Nov. 16, 17, 21, 22, 23; *Dec.* 14.

HUNTER *v.* WALTERS.
CURLING *v.* WALTERS.
DARNELL *v.* HUNTER.

Mortgage—Priority—Fraudulent Conveyance—Negligence in executing Conveyance and signing Receipts.

Hunter and *Darnell* were two mortgagees of an estate, the title-deeds to which were placed in the hands of *Walters*, a solicitor, in whom all parties had implicit confidence.

Walters, without authority from any of the parties, sold the estate to a nominal purchaser, who resold it to *Walters* himself, and the conveyance, dated in June, 1853, was made in execution of a power of sale in *Darnell's* mortgage. *Hunter* joined in the conveyance, and both he and *Darnell* executed it without reading it, and in ignorance of its real nature, believing at the time that it was a mere formal deed, which would not affect their mortgages, and both of them signed the usual indorsed receipt for purchase-money, without having received the amount of their charges. *Walters* then mortgaged the estate to *Curling*, and deposited the title-deeds with him. The interest upon the two prior mortgages having been regularly paid during *Walters'* life-time, the fraud was not discovered till his death, in 1865. Three suits were instituted to determine the priority of the mortgages:—

Held, that *Hunter* and *Darnell*, though they executed the conveyance of 1853 in ignorance of its contents, had passed the estate to *Walters*; that they had, by signing receipts for the purchase-money, armed *Walters* with the power of dealing with the estate as the absolute owner, and had thereby given priority to *Curling*, the subsequent mortgagee; and that a plea of purchase for valuable consideration was as available to the purchaser of an equitable as of a legal estate.

THESE three causes, *Hunter* v. *Walters*, *Curling* v. *Walters*, and *Darnell* v. *Hunter*, were suits by three mortgagees of the *Felling* estate, in the county of *Durham*, and the object was to determine the respective priorities of the mortgages on those estates. The Plaintiff, *William Hunter*, claimed under a mortgage created in 1835, and transferred to the late Mrs. *Hunter*, whose surviving executor he was in 1838. The Plaintiff in *Darnell* v. *Hunter* claimed under a mortgage executed to the late Mr. *Darnell* on the 5th of December, 1839; the Plaintiff in *Curling* v. *Walters* claimed under a mortgage executed by the late *Ralph Walters* to her late husband on the 11th of March, 1862.

In 1835 *John Brandling* and *Robert William Brandling* were

the owners of the *Felling* estate. They executed a mortgage in fee of the 25th of May, 1835, to *George Burdon*, for securing £7200 and interest. By deeds of the 25th and 26th of December, 1838, that mortgage was, with the concurrence of *Robert William Brandling*, who had then become the sole owner of the estate, transferred to the late Mrs. *Hannah Hunter*. Mr. *Ralph Walters*, a solicitor of *Newcastle*, was the solicitor of *Hannah Hunter*, and acted on her behalf in all matters relating to the mortgage transferred to her. *Ralph Walters* and his father before him were the solicitors of the *Hunter* family for fifty years and upwards. *Ralph Walters* was a person in whose integrity the highest confidence was placed by his clients. Upon the transfer of the mortgage all the title-deeds relating to the estate were delivered to Mrs. *Hunter*, and were by her, for safe custody, lodged in the bank of Messrs. *Ridley & Co.*, of *Newcastle-upon-Tyne*, and the key of the safe was given to Mr. *Walters*, and thus the deeds were, in effect, put in the possession of *Walters*. A schedule of the deeds was signed by Mrs. *Hunter*.

By the concurrence of all necessary parties a second mortgage was executed by Mr. *Brandling* on the 5th of January, 1839, to Mr. *Darnell*, who was also one of the clients of Mr. *Walters*, and one who also placed unbounded confidence in him. Mrs. *Hunter*, the first mortgagee, died on the 18th of July, 1840, having by her will, dated in 1838, appointed her sons, the Plaintiff *William Hunter* and the late *Henry Hunter*, her executors.

By a memorandum of the 11th of October, 1841, the mortgage debt of £7200, which was secured to Mrs. *Hunter*, and which, on her death, formed part of her assets, was distributed amongst her family in this manner: to Lady *Maxwell*, one of her daughters, £2800; to the late *Henry Hunter*, her son, £2800; to the Plaintiff, *William Hunter*, £1600; making up the full sum of £7200. It did not, however, appear that this arrangement was ever communicated to the mortgagor or to Mr. *Darnell*, and no notice of it was indorsed on the mortgage deed, nor was the memorandum in any way made to form part of the title.

After the death of Mrs. *Hunter*, *Ralph Walters* continued to act as the solicitor for her children, and for the trustees and executors of her will. In the year 1843 he became, and ever afterwards

V.-C. M. 1870

HUNTER v. WALTERS.

CURLING v. WALTERS.

DARNELL v. HUNTER.

continued to be, the Plaintiff *Hunter's* private solicitor; and continued throughout to hold all the title-deeds of the *Felling* estate on behalf of the persons interested under the will of *Hannah Hunter*.

The interest on the mortgage of £7200 was paid to *Walters* on behalf of all parties, and by him distributed amongst them according to their respective rights.

Robert William Brandling, the mortgagor, became embarrassed in his circumstances, and on the 21st of July, 1846, he executed a deed for the benefit of his creditors, including a conveyance of the equity of redemption upon this estate, to *William Lister* and *William Burnup*, as the trustees of that deed.

About the end of 1851, it appeared that *Walters* conceived the idea of making himself the owner, or the apparent owner, of this estate. He began, therefore, by making false pretences that the *Felling* mortgage would be paid off, which the *Hunter* family did not desire, as they had for several years regularly received their interest. He next told the Plaintiff *Hunter*, and the other members of his family, that the estate had been sold to a Mr. *Dove* for £200 less than the mortgage debts.

Without authority from any one he put the estate up for auction in January, 1853. He did not advertise it to an extent to secure the attendance of bidders, and he induced Mr. *Dove*, a friendly solicitor in the town of *Newcastle-upon-Tyne*, to attend at this sale. He and Mr. *Dove* bid against each other, till Mr. *Dove* got up to a sum of money which Mr. *Walters* thought would be sufficient for his purpose, and the estate was knocked down to *Dove* at £9050. Mr. *Dove*, the nominal purchaser, then entered into a contract with *Walters* to sell his bargain to him for £150. After this proceeding, the Plaintiff, Mr. *Hunter*, was told by *Walters*, in a letter dated the 31st of January, 1853, that the estate was sold, and that he would be paid off in about six months. The Plaintiff was also invited by *Walters* to join him in purchasing the estate, which, however, he declined. *Walters* instructed counsel to prepare a conveyance. The instructions were to the following effect: "I inclose the conditions of sale of this estate, which was sold by auction on the 26th of January last, Mr. *Dove*, solicitor, having become the purchaser. I have since contracted with Mr. *Dove* to take his purchase. A copy of the memorandum is also sent. Mr. *Clayton*

will prepare the conveyance from Mr. *Darnell*, the second mortgagee, to *Ralph Walters*—consideration, £9050. Mr. *Dove* will join in consideration of £150 paid to him this day. I expect Mr. *Clayton* has the remaining drafts relating to this title to enable him to prepare the conveyance. The first mortgagee, now represented by *William Hunter*, will join in the conveyance, he being paid his whole principal money, £7200; all interest having been paid to him. There is now due to Mr. *Darnell*, in respect of his mortgage, £2000, and some interest; therefore the purchase-money will fall somewhat short of paying the two mortgagees. All the property included in both first and second mortgage, with the exception of a few building sites, is to be conveyed to me."

The draft conveyance was accordingly prepared and engrossed in pursuance of such instructions, and the deed was duly executed by all parties on the 1st of June, 1853.

The parties to it were *William Hunter*, the first mortgagee, the surviving executor of the will of *Hannah Hunter;* the Reverend *William Nicholas Darnell*, the second mortgagee, who had a power of sale; *Thomas Dove*, the supposed purchaser; and *Ralph Walters*, the actual purchaser. It recited the mortgages, the sale, the purchase by *Dove*, and the purchase from him of his bargain for £150; and then all the parties were made to join in the deed acknowledging the purchase-money; and the deed contained a covenant by Mr. *Darnell* and Mr. *Hunter* that they had neither of them done anything to incumber the property.

The deed was executed by the Plaintiff, Mr. *Hunter*, and the late Mr. *Darnell*, and each of them signed receipts for the money which was due to them, though no money passed. *Dove* also executed and signed a receipt for £150, which, however, was not paid. Mr. *Hunter*, in giving his own account of the manner in which he executed the deed, said: "I had been told by the said *Ralph Walters*, early in the year 1853, that he was about to purchase the mortgagors' interest in the *Felling* estate; and it was fully agreed and understood between *Ralph Walters* and myself, and the other persons interested in the mortgage for £7200 on the *Felling* estate, that the said mortgage was not to be paid off on the occasion of the sale of the property, which *Ralph Walters* so represented as taking place, but was to remain at the reduced

V.-C. M. 1870 HUNTER v. WALTERS. CURLING v. WALTERS. DARNELL v. HUNTER.

rate of £4 per cent. interest. I was staying, in the month of June, 1853, at some lodgings in *London*, and *Ralph Walters* came to me there on one day in that month, without having made any appointment with me, and apparently in a great hurry, and placed a document or deed before me, which he asked me to sign, saying that it was a mere form as to the sale, and he at the same time stated that Mr. *Darnell*, the second mortgagee, had already signed it, pointing to what seemed to be the signature of the said Mr. *Darnell*. I never understood that Mr. *Darnell* was to be paid off on the occasion of the sale, but, on the contrary, that both the mortgages remained as they were, and that *Ralph Walters* purchased from the mortgagor, subject to the two mortgages. The document so placed before me by *Ralph Walters* was never read to me, nor was any part of it. It was only opened by *Ralph Walters* at the place where he said my name was to be written. I understood and believed, from what was stated to me as aforesaid by *Ralph Walters*, that the document or deed placed before me simply transferred the interest of the mortgagor in the said *Felling* estate to *Ralph Walters*, leaving my mortgage security for £7200 exactly as it was before, and that my signature as mortgagee, as well as that of Mr. *Darnell*, was a necessary form on the occasion of a transfer of the mortgagors' interest, but that the deed did not in any way relate to or affect my mortgage security. In this belief, and upon the total misrepresentation by *Ralph Walters* to me of what the document was, and having complete confidence in *Ralph Walters*, as being my solicitor and confidential agent, I wrote my name upon the document so placed before me, where *Ralph Walters* directed me so to do."

Upon the execution of this deed *Walters* caused himself to be treated as the owner of the estate. His brother, Mr. *Robert Walters*, who had long been the receiver, and who had always paid over the rents to his brother, as representing those who were interested, namely, Mr. *Hunter* and Mr. *Darnell*, then became his brother's receiver, and *Ralph Walters* was in every way recognised by the tenants and occupiers of the estate as their landlord, and was generally known and reputed in *Newcastle* and the neighbourhood to be the owner of the estate; but the mortgagees, who had acknowledged the payment of the mortgage debts, seemed

to be the only persons who were not aware of the altered state of things.

Walters, then, being in possession of the estate, regularly paid the mortgagees their interest down to the time of his death, which took place in April, 1865; but in 1862, nearly nine years after the deed of the 1st of June, 1853, the transaction with Mr. *Curling* took place which gave rise to the present difficulty in the case. The transactions with Mr. *Walters* and Mr. *Curling* were stated in the affidavit of Mr. *Tatham*, who was Mr. *Curling's* solicitor:— In the latter part of the year 1861, *Ralph Walters*, accompanied by his solicitor, Mr. *Gibson*, of *Newcastle*, had several interviews with Mr. *Tatham* respecting a mortgage security which *Ralph Walters* was then negotiating, and ultimately he asked for a loan of £5000 on the deposit of his title-deeds of the *Felling* estate. Mr. *Tatham* mentioned the subject to his cousin *William Curling*, who was an entire stranger to *Ralph Walters*, and had never heard of him; but as he happened to have a sum of money upon deposit with his bankers, he directed Mr. *Tatham*, if he considered the security a proper one, to accept it on his behalf. In pursuance of such direction, Mr. *Tatham* proceeded to make inquiry as to the nature and value of the *Felling* estate, and to investigate the title of *Ralph Walters* thereto, and he personally examined the title-deeds. The title shewn was perfectly simple and straightforward, nor was there anything upon the deeds calculated to raise any doubt or suspicion. He also made all the usual searches for the purpose of discovering if any judgments had been registered against *Walters*, or if the *Felling* estate in his hands was liable to any other charge or incumbrance. He further wrote to Mr. *Anderson*, a solicitor of great experience in *Newcastle*, and requested him to give his opinion of the *Felling* estate of *Ralph Walters*, and in answer to such letter he received from Mr. *Anderson* a very satisfactory answer to his inquiry. He also made inquiries of Mr. *Robert Walters*, the brother of *Ralph Walters*, and the receiver of the estate, as to the value of the property, and received from him a satisfactory letter; and he found that *Walters* was, and had for many years been, in undisputed possession of the estate as owner; that he held a conveyance thereof to himself in fee simple, free from all incumbrances, executed by all proper parties and

V.-C. M. 1870 HUNTER v. WALTERS. — CURLING v. WALTERS. — DARNELL v. HUNTER.

duly attested, with receipts for the consideration-money, signed by all proper parties; that all the title-deeds of the estate were in his uncontrolled possession, and that the estate would form, in point of value, an ample and sufficient security for the proposed loan of £5000. He accordingly accepted the security, received the sum of £5000 from Mr. *William Curling*, and paid it over to *Ralph Walters*. *Ralph Walters* regularly paid the interest on the £5000 down to and within a year of his death; and the last half-year's interest was paid on the 17th of April, 1865, by his solicitor, Mr. *Gibson*, that is, three days only before the death of Mr. *Walters*. Mr. *Tatham* further stated, that throughout the whole of the transaction he was never informed, and had no reason to believe, that *Ralph Walters* had ever been or acted as the agent of any previous owner, or of any person previously interested in the *Felling* estate. He had every reason to suppose that he had purchased the same in manner recited in the indenture of the 1st of June, 1853, without any previous connection with the property.

Mr. *Anderson*, the solicitor referred to, made an affidavit, in which he stated that *Ralph Walters* was universally believed throughout the whole neighbourhood to be, and was treated as being, the absolute proprietor of the *Felling* estate. He was described as owner in the rate-books of the parish of *Heworth* for the period of nine years, and paid his rates accordingly, and that he had performed various acts of ownership, and had sold portions of the estate from time to time to the *North Eastern Railway Company*, and to other persons for building sites.

Mr. *Robert Walters* stated, in his affidavit, that in the year 1846 he was appointed agent of the *Felling* estate for *Robert William Brandling*, and thenceforward collected the rents and managed the property. He always sent in his half-yearly accounts through *Ralph Walters*. In the year 1847 the Messrs. *Hunter* entered into possession as mortgagees, and from that time until the year 1853 the accounts were headed with their names, or with the name of one of them. He remembered the sale of the estate by public auction in the year 1853. The estate was at such auction purchased by a Mr. *Dove*, who, as he always understood, shortly afterwards sold it to *Ralph Walters*. It was well known in the

neighbourhood that *Walters* had purchased the estate, and from that time until his death he continued in possession thereof; and he himself entirely believed him to be the absolute and undisputed proprietor and owner of the estate. Mr. *Robert Walters* continued to manage and to collect the rent of the estate, but his accounts were thenceforward rendered to the said *Ralph Walters*. He also sold building sites on the estate in his name and by his exclusive authority.

The mortgage deed to Mr. *Curling* was made between *Walters*, as the owner of the estate, and *William Curling*, as mortgagee. It recited the loan, and, in consideration of £5000 paid by *Curling* to *Walters*, *Walters* handed over the deeds, and covenanted that he would, if the money were not paid within six months, execute a legal conveyance of the property. It was therefore a delivery of all the title-deeds relating to the estate, a charge on it by deed, and a complete mortgage, except that it did not comprise an actual conveyance of the legal estate.

There was further evidence to the effect that between 1853 and 1862 various letters had passed between *Walters* and members of the *Hunter* family, in which the former spoke of the *Felling* estates being still subject to the prior mortgages.

Sir *Roundell Palmer*, Q.C., Mr. *Cotton*, Q.C., and Mr. *Vaughan Hawkins*, for *W. Hunter*, the Plaintiff in the first suit:—

It is not denied that the sale of 1853 was a fraudulent transaction, and the auction a sham carried out for the purpose of fraud, or that the execution of the deed of June, 1853, by *Hunter* and *Darnell*, was obtained by misrepresentation. Under these circumstances, therefore, the deed is void both at law and in equity, and did not serve to divest the prior mortgagee of his legal estate.

If we assume, for the sake of argument, that the legal estate did pass out of the mortgagees by the effect of that deed, a prior equitable charge is not to be postponed to a puisne charge, whether by reason of possession of the title-deeds or anything else, except on the ground of such conduct as will raise a positive equity as against the prior incumbrancer.

Now, in this case, there has been no such conduct; the sole grounds on which misconduct can be charged are, first, that

V.-C. M.
1870
HUNTER
v.
WALTERS.
CURLING
v.
WALTERS.
DARNELL
v.
HUNTER.

William Hunter executed the deed of the 1st of June, 1853, and signed the receipt; secondly, that the deeds were for ten years left with *Walters*. These are the only facts on which a positive equity can be built up. As to the first, after Mrs. *Hunter's* death the mortgage debt was divided, and two of the shares did not, in equity, belong to *William Hunter*, except as a trustee. Even, therefore, if there had been no fraud attending the execution of the deed, however any beneficial interest of *Hunter* might have been affected, that of his *cestuis que trust* would not and could not be so: *Rice* v. *Rice* (1). If there had been, in the execution of the deed of the 1st of June, 1853, that which amounted, with respect to *Curling*, to a misrepresentation, it was the act solely of *William Hunter;* and not being done either with the sanction or even cognisance of these ladies, it could not in anywise affect their interests. No priority can ever be obtained through the wrongful acts of a trustee.

At the very least, supposing the legal estate had passed to *Walters* by this deed, it would have been charged in equity with the payment of the mortgage money purported to have been paid back to the *Hunters*.

Again, let us suppose that the prior charge had been lost by the effect of this deed. In the interval between 1853 and 1862 letters were written by *Walters* which, in themselves, are sufficient to create a charge as strong as any Mr. *Curling* could subsequently obtain.

This evidence is sufficient to constitute an equitable charge in our favour, which, upon the doctrine of *Mackreth* v. *Symmons* (2), will have priority to any subsequent charge, and this priority will only be postponed on proof of our negligence, or representations on our part conducing to *Walters'* fraud.

Is this sham deed, or rather piece of waste paper, such a representation? Can an equity be raised against a person on the ground of this document, and can any one who claims through a person standing in a fiduciary position (as *Walters* stood), and who has acted fraudulently, set up his title as against those having prior equitable interests? In *Barnard* v. *Hunter* (3) the principle

(1) 2 Drew. 73. (2) 15 Ves. 329.
(3) 2 Jur. (N.S.) 1213.

was affirmed, that those who take an assignment of an equity must take it subject to all equities affecting it at the time. In *Lewin* on Trusts (1), it is said that to maintain the opposite would be to assert that an equitable conveyance could have a tortious effect, which is contrary to all the doctrines of this Court. Nor can any person give an interest to another through a breach of duty: *Manningford* v. *Toleman* (2). A person who only claims in equity, as *Curling*, cannot set up, as against those having a prior equity, a deed fraudulently obtained from them. Unless, then, *Walters* can say that there was no breach of trust in his procuring the execution of the deed of 1853, it is impossible for *Curling* to come here and claim through that fraud. This is not the case of a person defending himself, but one who comes to maintain a claim in which equity will not assist him: *Thorpe* v. *Holdsworth* (3); *Newton* v. *Newton* (4). His claim is founded on a fraudulent act in a person who was in the capacity of an agent. This deed is a mere product of the fraud which is the foundation of *Curling's* claim, and he can base no equity whatever upon it: *Vorley* v. *Cooke* (5).

[The VICE-CHANCELLOR:—In *Colyer* v. *Finch* (6) it was decided that the protection to a *bonâ fide* purchaser without notice is not to be confined to the case where he gets the legal estate. *Rice* v. *Rice* (7) determined that the possession of the title-deeds gave the better equity. In *Layard* v. *Maud* (8) I decided to the same effect.]

The mere possession of the title-deeds, though by a purchaser for value, will not *per se* give him a better position. In order to do this, there must be some act or default on the part of the first incumbrancer, as an acquiescence of some years without making inquiry, and such an abstention from making inquiry must be with *mala mens*, and coupled with a presumption that it was intended to assist a mortgagor in committing fraud: *Cory* v. *Eyre* (9); *Hunt* v. *Elmes* (10); or there must be gross negligence amounting to con-

(1) 4th Ed. p. 453.
(2) 1 Coll. 670.
(3) Law Rep. 7 Eq. 139.
(4) Ibid. 4 Ch. 143.
(5) 1 Giff. 230. 4 Jur. N.S. 4.
(6) 5 H. L. C. 905. 8 Jur. N.S. 25.
(7) 2 Drew. 73.
(8) Law Rep. 4 Eq. 397.
(9) 1 D. J. & S. 145.
(10) 2 D. F. & J. 578. 7 Jur. N.S. 201

V.-C. M. 1870

HUNTER v. WALTERS.

CURLING v. WALTERS.

DARNELL v. HUNTER.

currence: *Roberts* v. *Croft* (1); *Evans* v. *Bicknell* (2); *Allen* v. *Knight* (3); or acquiescence: *Thorpe* v. *Holdsworth* (4).

Then, upon the question of negligence, consider the position of *Walters* with respect to the *Hunter* family. He and his father had for fifty years acted as solicitors to the *Hunters*. Surely they were justified in committing the title-deeds to his custody; and was not their conduct consistent with the ancient confidence reposed by them in the *Walters?* But it is said that these deeds should not have been left in his custody after the execution of the deed of 1853. The case of *Allen* v. *Knight* has decided that the mere fact of the title-deeds having been left by a mortgagee in the hands of the mortgagor, without any special act enabling him to commit a fraud, will not postpone the prior incumbrancer: there must be also fraud, or gross and voluntary negligence. That the title-deeds should have been left by the *Hunters* with *Walters*, even after the execution of the deed of 1853, the true effect of which they were ignorant of, does not amount to either fraud or gross or voluntary ignorance. In the case of *Cory* v. *Eyre* (5), Lord Justice *Turner* says: "The very first principle of trusts is, that the *cestui que trust* places confidence in his trustee, and if it is to be held that a *cestui que trust* is to be postponed upon the mere ground that he did not inquire into the acts and conduct of his trustee, that principle would, as it seems to me, be in a great measure destroyed." Substitute the words "solicitor and client" for "trustee and *cestui que trust*," and the words apply to the present case. In *Rice* v. *Rice* (6) it was said that the Court will not easily impute negligence, without special acts, *ultra* the mere leaving the deeds in possession of the mortgagor. Having regard to the acknowledgment of *Walters*, had we not a right to trust him?

Leaving title-deeds with your solicitor is not such great negligence as to bring in the presumption of *mala mens* necessary to cause a loss of priority; there must be such *crassa negligentia* as amounts to positive proof of *mala mens: Roberts* v. *Croft*; *Frazer* v. *Jones* (7).

(1) 2 De G. & J. 1.
(2) 6 Ves. 174.
(3) 5 Hare, 272; 11 Jur. 527.
(4) Law Rep. 7 Eq. 139.
(5) 1 D. J. & S. 149.
(6) 2 Drew. 73.
(7) 5 Hare, 475.

(Ch. App. 1869) 4 Beav. 223: 8 Jur. N.S. 1069

V.-C. M.
1870
HUNTER v. WALTERS.
CURLING v. WALTERS.
DARNELL v. HUNTER.

But, then, we say that this deed was void altogether: *Vorley* v. *Cooke* (1); *Lee* v. *Angas* (2). There is a distinction between a void and a merely voidable deed. Where void, it cannot be read against the person executing it for the purpose of raising an equity against him, or for any purpose whatever; it was simply incapable, *ab initio*, of passing any estate or interest whatever. Where a deed is voidable only, the person may be, by matter arising *ex post facto*, estopped; and it has been asserted that when a deed purports to convey, and the person conveying abandons possession to the person taking under such fraudulent deed, this has had the effect of confirming the voidable deed. How can a mortgagee, who is not in possession, be affected by who may be the person actually in possession. *Ralph Walters* himself was never rightfully in possession. Neither *Hunter* or *Darnell* gave up possession to *Ralph Walters*, nor was there any change in the possession or in the person receiving the rents.

There are two other points—whether the legal estate passed by the deed of 1853, and whether there was not sufficient on the face of the deeds submitted to *Curling* to put him on inquiry and affect him with notice. As to the first, we have got the legal estate. The deed was executed under a false representation, as being merely ancillary to some other transaction, leaving the mortgage as it stood. In the case of *Ogilvie* v. *Jeaffreson* (3) a deed had been executed by a prior mortgagee under a false representation by his solicitor, who afterwards acted as solicitor to a subsequent purchaser for value without notice. There it was decreed that the deed was wholly void at law and in equity, and it was delivered up to be cancelled. *Vorley* v. *Cooke* is another case in which a deed fraudulently procured by a solicitor to be executed was held to be wholly void, and to pass no estate, and the subsequent purchaser without notice for valuable consideration set aside. *Lee* v. *Angas* and *Kennedy* v. *Green* (4) are also authorities to the same effect.

On the second head, as to notice, should the Court think it necessary to go into that, the case of *Kennedy* v. *Green* decides that suspicious circumstances appearing on the face of a deed are

(1) 1 Giff. 230.
(2) 15 W. R. 116.
(3) 2 Giff. 353.
(4) 3 My. & K. 699.

V.-C. M.
1870
HUNTER v. WALTERS.
CURLING v. WALTERS.
DARNELL v. HUNTER.

sufficient to put the purchaser on inquiry, and thus to affect him with constructive notice of former incumbrances. Portions of the property had been sold for building sites, and the plan had not been altered, consequently the property did not agree with the plan; and there were other irregularities connected with the attestation and signatures, which were sufficient to lead to inquiries from those who could have explained the nature of the transaction.

Mr. *Glasse*, Q.C., and Mr. *Rigby*, for *Clement Lister*, and the persons beneficially entitled under the trusts of the creditors' deed of 1846, and also for the representatives of *Darnell*:—

As regards *Lister*, he had nothing to do with the deed of 1853; therefore, as far as he is concerned, it was an absolute nullity. He cannot be affected by the void exercise of *Darnell's* power of sale. Even if those mortgages were destroyed by the effect of the deed of 1853, he is still entitled to the equity of redemption.

In as far as we claim for the representatives of *Darnell*, we contend, first, that this deed was absolutely a nullity; secondly, even should it not be held such, he had, by the effect of letters and admissions of *Ralph Walters*, a good equitable charge prior to that of *Curling*; and, thirdly, *Walters'* conduct was such as to affect *Curling* with constructive notice of the infirmity of his title, and of the existence of the prior incumbrances.

With regard to the first contention, the case of *Foster* v. *Mackinnon* (1) is an authority, where a bill of exchange, actually a negotiable instrument in the hands of a subsequent holder for value without notice, but signed under a misapprehension, was set aside and declared null and void. It was there held that it was not only necessary that the signature should be genuine, but that it should be a signature to a bill of exchange as such. *Colyer* v. *Finch* (2) and *Roberts* v. *Croft* (3) are cases to the same effect, which were affirmed on appeal, and have been followed in many later decisions. A thing beginning and ending in a fraud is a nullity, and of no effect. The judgment in *Rice* v. *Rice* (4) seems to govern the present case. *Darnell*, as second mortgagee, never had nor could have had the deeds, therefore no laches could be

(1) Law Rep. 4 C. P. 704.
(2) 5 H. L. C. 905.
(3) 2 De G. & J. 1.
(4) 2 Drew. 73, 83.

imputed to him. Was his execution of the deed a representation on his part to mislead *Curling*, and having the effect of postponing him in equity? The evidence proves that his signature was obtained under a fraudulent misrepresentation by *Walters*, and that he had no notice of the effect of his execution. To the end of his life *Walters* treated his charge as still subsisting. Whatever negligence he has been guilty of was fully excusable on the authority of *Plumb* v. *Flewitt* (1) and *Evans* v. *Bicknell* (2). His execution of the deed had no validity, in so far as he was ignorant of its purport and effect: *Lloyd* v. *Attwood* (3).

On the second point, the accounts periodically rendered of the interest on this mortgage are admissions in writing, on the part of *Walters*, of *Darnell's* charge, sufficient to establish the second contention.

On the third point we rely on the suspicious circumstances attending *Walters'* supposed acquisition of the property under the deed of 1853, and the internal evidences of fraud in his title, all of which led up to notice of the prior incumbrance.

Darnell was not guilty of any negligence. It is no ordinary negligence, but culpable negligence, that must be established in order to postpone a vested estate or interest. *Swan* v. *North British Australasian Company* (4) decides that execution under a misrepresentation is not such gross negligence, and will not estop the person who has so signed from pleading *non est factum*. In *Foster* v. *Mackinnon* (5) and *Edwards* v. *Brown* (6) it is laid down that there must be a mind to execute, and that if there is any misrepresentation it must be the immediate cause of injury, not a mere link in the chain on which the fraud depends. *Hunter's* and *Darnell's* misrepresentation, if any, was that they had no longer any charge on the property, but the real misrepresentation was that of *Walters*, in asserting himself to be the owner of the equity of redemption. *Young* v. *Grote* (7) is a case where the execution was the immediate cause of fraud, and does not tell against us.

(1) 2 Anst. 438.
(2) 6 Ves. 174.
(3) 3 De G. & J. 614.
(4) 7 H. & N. 603.
(5) Law Rep. 4 C. P. 704.
(6) 1 C. & J. 307.
(7) 4 Bing. 253.

V.-C. M. 1870

HUNTER v. WALTERS.

CURLING v. WALTERS.

DARNELL v. HUNTER.

Mr. *Kenyon*, Q.C., Mr. *Edward Harrison*, and Mr. *B. Rogers*, for Mr. *Curling*:—

There was no negligence on the part of *Curling* in the investigation of the title, nor could he be affected with constructive notice. The title was fully investigated by his solicitors. *Walters* was commonly believed in the neighbourhood to be the owner of the *Felling* estate after 1853: he granted leases in his own name, sold building sites in his own name, and performed other acts of ownership. His own brother stated, in his affidavit, that he had always believed *Ralph Walters* to be the owner, and he had always accounted to him for the rents as such. *Hunter* must have known that *Walters* assumed to be the purchaser, for in February, 1853, *Walters* asked *Hunter* whether he would join him in the purchase. As to whether a deed obtained through fraudulent misrepresentation is incapable of being the foundation of an equitable interest in another, it may be stated that the case of *Kennedy* v. *Green* (1) was doubted as an authority by Lord *St. Leonards* (2), and it turned principally on the exceedingly suspicious circumstances patent on the face of the deed, stamping it as fraudulent, irrespective of its contents, and also on the fact of the same solicitor having acted for all parties, so as to bring in constructive notice through an agent. *Curling* never employed *Walters* as his solicitor. Where one of two innocent persons must suffer by the fraud or negligence of a third, whichever of the two gives him credit must bear the consequences: *Fitzherbert* v. *Mather* (3); *Lynch* v. *Dunsford* (4); *Proudfoot* v. *Montefiore* (5); *Young* v. *Grote* (6); *Majoribanks* v. *Hovenden* (7); *Tayler* v. *Great Indian Peninsula Railway Company* (8); *Withington* v. *Tate* (9); *Perrin* v. *Burbey*, before Vice-Chancellor *Malins*, June 9, 1869. In *Ogilvie* v. *Jeaffreson* (10) and *Vorley* v. *Cooke* (11), which have been cited against us, constructive notice was implied from the fact that the person who committed the fraud was the solicitor to all parties. *Eyre* v. *Bur-*

(1) 3 My. & K. 699.
(2) Vend. & Pur. 10th Ed. vol. iii. p. 475.
(3) 1 T. R. 12.
(4) 14 East, 494.
(5) Law Rep. 2 Q. B. 511, 522.
(6) 4 Bing. 253.
(7) Dru. 11.
(8) 4 De G. & J. 559.
(9) Law Rep. 4 Ch. 288
(10) 2 Giff. 353.
(11) 1 Ibid. 230.

mester (1) is in our favour, for Lord *Cranworth* expressly said: "If the advance had been made on the faith of the title which the release gave, the case would have been different." There the money was advanced before the release was executed, and the release was obtained by fraud to secure the bank advancing the money to *Sadleir*.

This deed is not void absolutely, but voidable. It could only be void when executed under complete misapprehension. Now *Hunter* was under no such misapprehension. *Thoroughgood's Case* (2) shews only that a deed is void where it has not been read over to the party executing it, and who has required it to be read to him. As to whether a fraudulent deed can support an equity in an innocent third person claiming under it, we may cite the cases of *Doe* v. *Martyr* (3), *White* v. *Garden* (4), and *Kingsford* v. *Merry* (5), in all of which a purchase obtained from a vendor selling under a fictitious title fraudulently obtained was held good, the void deed being made good by matter *ex post facto*. Even allowing that *Hunter* and *Darnell* had re-established themselves, through the admissions of *Walters*, as equitable incumbrancers, prior to *Curling's* charge, their priority in point of time is not alone sufficient to give them the better position. In *Rice* v. *Rice* (6), Vice-Chancellor *Kindersley* expressly affirmed that priority in time could only be considered a ground of preference where the equities are in all other respects equal. The possession of the title-deeds would disturb the balance, as also would the laches of which the first incumbrancers might have been guilty: *Layard* v. *Maud* (7). The case of *Thorpe* v. *Holdsworth* (8) does not exactly touch the point in *Layard* v. *Maud*. *Thorpe* v. *Holdsworth* decided that the title-deeds should not be detained by the second mortgagee unless he had the legal estate, or the best right to call for it. We say that our custody of the title-deeds gives us (in a concurrence of equitable incumbrances) the best right to call for the legal estate.

The case of *Worthington* v. *German* (9) decided that the rela-

(1) 10 H. L. C. 90.
(2) Co. Rep. 2, 5 b.
(3) 1 B. & P. (N. R.) 332.
(4) 10 C. B. 919.
(5) 11 Ex. 577.
(6) 2 Drew. 73, 76, 77.
(7) Law Rep. 4 Eq. 397.
(8) Ibid. 7 Eq. 139.
(9) 16 W. R. 187.

V.-C. M. 1870 HUNTER v. WALTERS. CURLING v. WALTERS. DARNELL v. HUNTER.

tionship of solicitor and client, supposing it to have existed, will not shelter a first incumbrancer from the results of allowing the deeds to come into the hands of an innocent third party. And in *Waldron* v. *Sloper* (1) it is laid down that though a mortgagee may leave the deeds for some little time in possession of the mortgagor, he may not leave them there *ad infinitum* without making any inquiry after them. This was followed by *Hewitt* v. *Loosemore* (2). Was *Curling's* conduct such as to affect him with constructive notice? It is not asserted that he designedly abstained from making inquiry; and therefore, on the authority of *Jones* v. *Smith* (3), he cannot be said to have been grossly negligent. The definition of constructive notice given by Vice-Chancellor *Wigram* in this case certainly does not apply to such as we have here.

There is no recent case in which a second mortgagee having the title-deeds has ever been postponed. The contrary was decided in *Dowle* v. *Saunders* (4). In *In re Overend, Gurney, & Co.* (5) a contract obtained by fraud was held not to be void, but voidable only, and subject to the rights of third parties.

[*Martinez* v. *Cooper* (6), *Briggs* v. *Jones* (7), and *Jones* v. *Rhind*, before Vice-Chancellor *James*, July 23, 1869, were cited on the points of constructive notice.]

Mr. *Stevens*, for *Elizabeth Walters*, the personal representative of *Ralph Walters*.

Mr. *Langworthy*, for *Catherine Walters*, a trustee under the will of *Ralph Walters*.

Sir *Roundell Palmer*, in reply:—

In 1853 *Walters* was aware that the beneficial interest in this mortgage had been divided, and that *Hunter* stood in the position of trustee. He comes to *William Hunter*, a trustee for the persons beneficially interested, and by a misrepresentation induces him to execute this deed without their concurrence or authority, or participation in anywise whatever. The principles of this Court

(1) 1 Drew. 193.
(2) 9 Hare, 449.
(3) 1 Ibid. 43.
(4) 2 H. & M. 242.
(5) Law Rep. 3 Eq. 576.
(6) 2 Russ. 198.
(7) Law Rep. 10 Eq. 92.

will not allow them to be postponed in favour of a subsequent equitable incumbrancer because of the default of their trustee. But this is not all: the whole transaction is fictitious for the purpose for which the deed was executed. It purported to be a sale by a second mortgagee, with the concurrence of the first mortgagee. The first charge could not be displaced, except by the exercise of their power; there was in the eye of the law and in equity no such exercise, because of the fraud and misapprehension connected with it; and therefore no interest whatever passed to *Walters*. If any had passed, *Walters* would still have been trustee for the original incumbrancers.

As regards the cases cited against us, in *Cory* v. *Eyre* (1) it was held that a fraud practised by a trustee upon a *cestui que trust* could not postpone the *cestui que trust* to a third person. In *Rice* v. *Rice* (2) it was admitted that it was impossible to postpone a *cestui que trust* through a fraud practised on the *cestui que trust* by his trustee. It was argued that those who trust most must suffer most, but the cases of *Roberts* v. *Croft* (3) and *Hunt* v. *Elmes* (4) restrict the universal application of this rule, and negative the idea that parties are to be postponed. In the ordinary course of business we had a right to leave the deeds in the custody of our solicitor. The limits of the doctrine that the Court will not take away the title-deeds from a subsequent equitable incumbrancer without notice, are distinctly marked out in *Allen* v. *Knight* (5), *Cory* v. *Eyre*, and *Newton* v. *Newton* (6). But the possession of the title-deeds is not what we seek. The rule has no application to this case: we cannot escape administration of the estate for the creditors, according to their priorities. *Tayler* v. *Great Indian Peninsula Railway Company* (7) bears upon the amount of negligence and representation *Hunter* and *Darnell* were guilty of in executing the deed of 1853. There the distinction was made between an act which was the immediate cause of a fraud being committed, and one which only mediately subserved that purpose in the hands of a fraudulent person. There it was held that there

(1) 1 D. J. & S. 149.
(2) 2 Drew. 73, 83.
(3) 2 De G. & J. 1.
(4) 2 D. F. & J. 578. 7 Jur. N.S. 200
(5) 5 Hare, 272.
(6) Law Rep. 4 Ch. 143.
(7) 4 De G. & J. 559. 5 Jur. N.S. 1087

V.-C. M. 1870

HUNTER v. WALTERS.

CURLING v. WALTERS.

DARNELL v. HUNTER.

was no fraud in getting the signature, but only in the use made of it. *Withington* v. *Tate* (1) was a case of fraud committed by a solicitor who received purchase-moneys having no authority to do so at the time; and it was expressly held that the authority he afterwards obtained could not operate retrospectively so as to bind his clients. But the solicitor was not in a fiduciary position, as here; and it was remarked in the judgment, "It is not every agent that stands in a fiduciary relation." *Eyre* v. *Burmester* (2) is distinctly an authority in our favour; for there *Eyre* was no trustee, but dealt with his own property. *Perry-Herrick* v. *Attwood* (3) shews that possession of title-deeds by a second incumbrancer must have been through some neglect or default of the prior incumbrancer. *Jones* v. *Rhind* appears, at first, as if it could not be reconciled with *Allen* v. *Knight* (4); but the deeds there had been left for twenty-four years in possession of the mortgagor, and it was held that this was a case of acquiescence on the part of the first mortgagee, and that he had constructive notice of the second mortgage. The parties in *Layard* v. *Maud* (5) were at arm's length, and there was no fiduciary relation existing. The cases of *Fitzherbert* v. *Mather* (6), *Lynch* v. *Dunsford* (7), and *Proudfoot* v. *Montefiore* (8), were insurance cases, and turned on quite a different point, viz., as to whether parties were bound by the acts of their agents — not trustees; and they have no application. *Kennedy* v. *Green* (9) and *Thoroughgood's Case* (10) shew that a deed based on fraud is void altogether. It is not merely voidable, in the sense that the person executing it had authority to rescind it, but it is not his deed at all. In the latter case, the third point resolved was, that a deed was void not only because it has not been read over to the party executing it, but because there has been misrepresentation. The cases of *White* v. *Garden* (11) and *Kingsford* v. *Merry* (12) were cases of mercantile contracts, and do not apply here. The case of *In re Overend, Gurney, & Co.* (13) makes a distinc-

(1) Law Rep. 4 Ch. 288.
(2) 10 H. L. C. 90.
(3) 2 De G. & J. 21.
(4) 5 Hare, 272.
(5) Law Rep. 4 Eq. 397.
(6) 1 T. R. 12.
(7) 14 East, 494.
(8) Law Rep. 2 Q. B. 512.
(9) 3 My. & K. 699.
(10) Co. Rep. 2, 5 b.
(11) 10 C. B. 919.
(12) 11 Ex. 577.
(13) Law Rep. 3 Eq. 576.

tion between void and voidable deeds, and decides that a deed is voidable only where the person has been defrauded *in re ipsa*, and the deed fraudulently obtained is the immediate cause of loss. Here there was no intention of placing the estate in *Walters'* hands, and the deed could only cause loss through further fraud on his part.

Mr. *Glasse*:—If *Darnell* exercised the power of sale through fraudulent representation on *Walters'* part, it was no exercise at all, and void *in toto*. The case of *Jones* v. *Thomas* (1) proves this conclusively, it being a case running on all-fours with the present.

Dec. 14. SIR R. MALINS, V.C.:—

These three suits were fully and ably argued before me on five days of last term. The transactions relating to the estate are of an extraordinary character, and it is necessary to state them somewhat in detail:—[His Honour then stated all the circumstances of the case, as already set forth, and continued:—]

The dates of the respective mortgages would settle their priorities, unless there were circumstances to take the case out of the ordinary rule—*qui prior est tempore potior est jure*. But what I have to decide is, which of three innocent parties is to suffer by the fraud of the fourth, namely, *Ralph Walters*. It cannot be denied that Mr. *Darnell* and Mr. *Hunter* were most negligent in signing the receipts for the mortgage money, indorsed upon the deed of the 1st of June, 1853, without receiving the money, or even making inquiry when they were to receive it. The execution of a deed under the influence of confidence reposed in the solicitor who presents it for execution is intelligible, and in the present case the mere execution of the deed of the 1st of June, 1853, would have been harmless if it had not been for the signing of the receipts for the money, which are in form so plain and intelligible, that I am quite unable to find any excuse for it. There is no possible excuse for their not knowing what they were signing. The sums stated to be received by Mr. *Hunter* and Mr. *Darnell* re-

(1) 11 W. R. 50.

V.-C. M.
1870
HUNTER
v.
WALTERS.
CURLING
v.
WALTERS.
DARNELL
v.
HUNTER.

spectively are in large and conspicuous figures, and no one could have failed to understand the effect of the receipt clause; but, notwithstanding this, no money was ever paid by *Walters* to either of them. Did they not then, by signing the receipt, in the language of Sir *Richard Kindersley*, in *Rice* v. *Rice* (1), voluntarily arm the purchaser *Walters* with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of incumbrance or adverse equity? I am of opinion that they did. It was not denied in the argument by the counsel for the two first mortgagees, that if *Curling's* solicitor had written to them to know if these mortgages had been paid off, and they had answered in the affirmative, they would have been bound, though in fact they had not been paid. Did they not by the receipt say, and do they not continue to say to all persons dealing with the estate, "We are paid, and you need not make any more inquiries of us?" I am of opinion that they do.

In the absence of authority, therefore, I should without difficulty have come to the conclusion that Mr. *Darnell* and Mr. *Hunter* have, as between themselves and a subsequent purchaser or mortgagee of the estate, bound themselves by the receipts, and thereby given priority to the subsequent mortgagee, who took without notice that they had not been paid. There is distinct authority in favour of this view in *Rice* v. *Rice*, a case very much commented upon in the argument, frequently referred to, and, I think, a most excellent authority. The vendor of an estate not having received the purchase-money, executed a conveyance and also a receipt for the purchase-money in the usual form, like the present on the back of the deed. The purchaser, not, as in this case, after the lapse of nine years, but the very next day, deposited the title-deeds, including the purchase deed so executed, and receipts, with a *bonâ fide* mortgagee for value. Then the vendors filed the bill to have it declared that they had a lien upon the land against the mortgagee because the purchase-money was unpaid. But the decision of Vice-Chancellor *Kindersley* was perfectly distinct, and has been recognised ever since. It is, I think, one of the leading authorities we have, and I read only one paragraph of his judgment (1), which I think is conclusive on the present case. He says: "Indeed, it appears to

(1) 2 Drew. 83.

me that in all cases of contest between persons having equitable interests, the conduct of the parties and all the circumstances must be taken into consideration in order to determine which has the better equity. And if we take that course in the present case, everything seems in favour of the Defendant, the equitable mortgagee. The vendors, when they sold the estate, chose to leave part of the purchase-money unpaid, and yet executed and delivered to the purchaser a conveyance by which they declared in the most solemn and deliberate manner, both in the body and by a receipt indorsed, that the whole purchase-money had been duly paid."—Precisely the case here.—"They might still have required that the title-deeds should remain in their custody, with a memorandum, by way of equitable mortgage, as a security for the unpaid purchase-money, and if they had done so they would have been secure against any subsequent equitable incumbrance; but that they did not choose to do, and the deeds were delivered to the purchaser. Thus they voluntarily armed the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of incumbrance or adverse equity. In truth it cannot be said that the purchaser, in mortgaging the estate by the deposit of the deeds, has done the vendors any wrong, for he has only done that which the vendors authorized and enabled him to do. The Defendant, who afterwards took a mortgage, was in effect invited and encouraged by the vendors to rely on the purchaser's title. They had, in effect, by their acts assured the mortgagee that, as far as they (the vendors) were concerned, the mortgagor had an absolute indefeasible title both at law and in equity."

A similar decision was pronounced by the Master of the Rolls in the case of *Worthington* v. *German* (1); and this was a case of trust money; and so far, therefore, it meets one of the arguments particularly pressed upon me by Sir *Roundell Palmer*. There the mortgagee got his foreclosure decree, and those who sought to impeach the transaction had their bill dismissed with costs.

It appeared to me to be conceded by the counsel for the two first mortgagees, that if Mr. *Curling* had taken a conveyance of the legal estate, he would have gained priority over them. That

(1) 16 W. R. 187.

V.-C. M. 1870

HUNTER v. WALTERS.

CURLING v. WALTERS.

DARNELL v. HUNTER.

appears to me to be the only act of omission on the part of the solicitor of Mr. *Curling*. Much stress was laid upon the fact of his not having done so; but in both the cases I have just cited the mortgages were by mere deposit of title-deeds, and yet the priority was gained; and in *Colyer* v. *Finch* (1), an authority cited and relied upon by Sir *Roundell Palmer*, it was decided that a plea of purchase for valuable consideration without notice is as available to a purchaser with an equitable estate only, as to one with the legal estate. There are many other authorities to the same effect, which are all collected by Lord *St. Leonards*, in his book on Vendors and Purchasers, relating to a plea of purchase for valuable consideration without notice, and he comes to the same conclusion. Indeed, the authority cited of *Colyer* v. *Finch* had settled that this defence is as available to a purchaser of an equitable estate as of a legal estate. I cannot, therefore, accede to the objection taken to *Curling's* mortgage, which is founded on the want of the legal estate.

Much reliance was placed by the counsel for Mr. *Hunter* and Mr. *Darnell* on the case of *Kennedy* v. *Green* (2). Apart from the particular circumstances attending the form of the deed, which were held to put the purchaser upon inquiry, the facts of that case were almost identical with the present. There the Plaintiff, Mrs. *Kennedy*, upon a false representation made to her by her solicitor *Bostock*, a solicitor in whom she also placed unbounded confidence, executed a deed which he told her was a better security for her money, but which was, in fact, an assignment of the mortgage to himself in consideration of the full amount of the mortgage-money, stated to be paid by him. Armed with this deed, *Bostock* sold and assigned a leasehold property comprised in the mortgage to his father-in-law, *Kirby*, who, without employing any other solicitor, accepted the title and paid the purchase-money to *Bostock*. It was decided by Sir *John Leach* and Lord *Brougham* that *Kirby* was bound by all that would have been discovered by an independent solicitor acting on his behalf, and that such a solicitor would, from the appearance of the deed executed by the Plaintiff, have made further inquiries, which would have led to the discovery of the fraud practised by *Bostock*, and that he was, con-

(1) 5 H. L. C. 905. (2) 3 My. & K. 699.

sequently, bound. But it is plain that both those learned Judges would have held the Plaintiff to be bound by the receipt signed by her, if it had been in the usual form and in the usual place. And with regard to that case, Lord *St. Leonards*, in commenting upon it in *Marjoribanks* v. *Hovenden* (1), says: "It always occurred to me that a very good answer could have been given to the argument, that if *Kirby*, the mortgagee, had looked at the deed, he must have discovered the fraud, namely, why did not you, the Plaintiff, look at the deed yourself, and thus prevent the occurrence of the original fraud, which, but for your own culpable negligence, would never have been committed?" Now there was the excuse there that Mrs. *Kennedy* was an aged widow lady, unacquainted with business. In the present case, Mr. *Darnell*, from all I have heard, was a man of eminent ability and learning, and perfectly competent; and although eighty years of age, perfectly able to attend to his business. Mr. *Hunter*, also, is a gentleman of education and position; and yet neither of them would take the trouble to read receipts which they sign for these large sums of money. Therefore it is an observation that is applicable here, that the fraud could not have happened if they themselves had looked at what they were signing. This observation of Lord *St. Leonards* applies with peculiar force to the present case, in which the fraud committed by *Walters* would have been impossible if Mr. *Hunter* and Mr. *Darnell* had simply refrained from signing the receipts, or, having signed them, had kept the deeds in their possession till they received the money, as the unpaid vendor did in *Worthington* v. *Morgan* (2), and thereby preserved his priority as against a subsequent incumbrancer of the vendee. *Cory* v. *Eyre* (3) was also relied upon in the argument against Mrs. *Curling*. There the Plaintiff, Mr. *Eyre*, took a mortgage in the name of *John Sadleir*, and took a declaration of trust only from him, leaving the mortgage deed in *Sadleir's* possession. *Sadleir* then, representing himself as the owner of the mortgage debt, as he was well enabled to do by the possession of the mortgage deed, no other name appearing, borrowed a large sum of money of his bankers upon the deposit of the mortgage deed, and it was held (I must confess,

(1) Dru. 11, 21.
(2) 16 Sim. 547.
(3) 1 D. J. & S. 149.

V.-C. M. 1870

HUNTER v. WALTERS.

CURLING v. WALTERS.

DARNELL v. HUNTER.

somewhat to my surprise, and I say so, after having again and again considered the case) that *Eyre* had not been guilty of such negligence as to make the security of the bank good against him. But there *Eyre* had not done any positive act—it was a simple omission to require possession of the deed; and, in his judgment in that case, the Lord Justice *Turner* says (1): "The Appellants" (that is, the *County Bank*, the bankers who had lent *Sadleir* the money) "relied upon *Waldron* v. *Sloper* (2), *Rice* v. *Rice* (3), and *Perry-Herrick* v. *Attwood* (4); but the case of *Waldron* v. *Sloper* differs so materially in its circumstances from the present case that it is unnecessary to give any opinion upon it; and as to the other cases, in *Rice* v. *Rice* the party claiming the prior equity had executed a deed in which he had acknowledged to have received the amount which he claimed." This shews, I think, that the Lord Justice *Turner* would have considered *Eyre* bound if he had signed a receipt for the mortgage debt from *Sadleir*. This was followed by *Eyre* v. *Burmester* (5), arising out of the same sort of transactions between Mr. *Eyre* and the same *John Sadleir*. These authorities appear to me to adopt to the full extent the doctrine established by the decision of Sir *Richard Kindersley*, in *Rice* v. *Rice*, that a vendor or mortgagee, by executing a conveyance or transfer of mortgage, and signing the usual receipt for the purchase or mortgage money, puts it in the power of the person in whose favour the deed is executed and the receipt given, to commit a fraud, and must be bound by the consequences. I am, therefore, of opinion that, as between Mr. *Hunter* and Mr. *Darnell* and *Curling*, the two former are precluded by the receipt they have signed from the right to deny that they received the money which they have acknowledged to have received.

With regard to the effect of the possession of the deeds by one of two equitable incumbrancers, I do not see any reason to depart from what I decided on the subject in *Layard* v. *Maud* (6), and also in the case of *Perrin* v. *Burbey*. Two cases were relied upon —both decisions of Sir *John Stuart*—that is, *Vorley* v. *Cooke* (7)

(1) 1 D. J. & S. 170.
(2) 1 Drew. 193.
(3) 2 Ibid. 73.
(4) 2 De G. & J. 21.
(5) 10 H. L. C. 90.
(6) Law Rep. 4 Eq. 397.
(7) 1 Giff. 230.

V.-C. M. 1870

HUNTER v. WALTERS.

CURLING v. WALTERS.

DARNELL v. HUNTER.

and *Ogilvie* v. *Jeaffreson* (1). *Vorley* v. *Cooke* (2) was a case in which an attorney presented a deed for execution by his client, telling him it was a covenant to produce title-deeds. It was, in fact, a mortgage from the client to the attorney, and therefore a gross fraud was committed; so gross that Vice-Chancellor *Stuart* held that the deed was entirely void, because the client was called upon to execute a deed, being told it was one thing, when in reality it was another. The question arose between the client who had thus been defrauded and the transferee of the mortgage, and it was held to be absolutely void as against the transferee, upon the obvious principle that every transferee of a mortgage takes subject to all the equities, whatever they may be, between the mortgagor and mortgagee. The transfer was taken without any communication with the client, the mortgagor; the transferee therefore could stand in no better position than the mortgagee, and between the mortgagor and mortgagee the deed was absolutely void, and was therefore equally void as respects the transferee of that mortgage. In the case of *Ogilvie* v. *Jeaffreson*, *David Hughes*, a solicitor practising in the city of *London* some fifteen or twenty years ago, induced a client, upon the representation that a deed was one thing, while in truth it was another, to execute a conveyance to *Mary Jones*, his domestic servant. The deed was a pure fraud. Many persons took mortgages from *Mary Jones*. I argued the case for one of them; but the fact was, that *Mary Jones* had never been in possession of the estate, and the primary duty of a mortgagee, before he takes a security, is to do that which Mr. *Curling's* advisers did, inquire who is in possession of the estate; and if they had made any inquiry, they would have found that *Mary Jones* was not in possession of the estate, but was in *David Hughes'* house as a domestic servant, and had never seen the estate; and the poor woman was so far made an instrument in the fraud that she came forward in the cause and disclaimed all interest. In that case Sir *John Stuart* said: "They took a mortgage from a person who never had anything to convey, who never had been in possession of the estate, and therefore this is an instance of the mortgagees taking a security without inquiry as to possession; and the rule of the Court is, that every purchaser of an estate, whether the word

(1) 2 Giff. 353. (2) 1 Giff. 230.

V.-C. M. 1870 HUNTER v. WALTERS. CURLING v. WALTERS. DARNELL v. HUNTER.

'purchaser' is used in the strict sense of the word, or as mortgagee, has notice of all rights, and is bound to inquire as to the possession of the estate."

Hunt v. *Elmes* (1) was also relied upon, but that case has no further application to the present than as shewing that the Court will not deprive a purchaser for valuable consideration without notice, of any advantage he has gained by the possession of the deeds or otherwise; and this is the doctrine of the Court, as laid down in the celebrated case of *Head* v. *Egerton* (2), where one person having the legal estate without the deeds, and the other the deeds without the legal estate, the Court refused to interfere between them, being both purchasers for valuable consideration, and it would not deprive the one of the legal estate he had gained or the other of the deeds, but left each in possession of the advantages he had got.

Several cases were cited to shew that a mortgagee, by giving up the deeds to the mortgagor, is bound by any adverse use which he may make of them. *Perry-Herrick* v. *Attwood* (3) is a remarkable instance of this rule. There the mortgagees, who were the sisters of the mortgagor, allowed him to retain the deeds in order to give security for a particular debt for which he was being sued, and he afterwards deposited them with the Plaintiff, Mr. *Perry-Herrick*, for a much larger sum, and it was held that the sisters' mortgage was postponed to that of the Plaintiff.

Waldron v. *Sloper* (4) is another instance of this. I do not think it necessary to advert more particularly to the other authorities, which were cited on this branch of the case, except *Allen* v. *Knight* (5), which was a decision founded so much upon the peculiar and unexplained circumstances under which the deeds got into the possession of the mortgagor, that it does not appear to me to afford any general rule.

It was strongly urged by Sir *Roundell Palmer*, for the Plaintiff *Hunter*, that the correspondence between *Walters* and the *Hunter* family was sufficient to create a new charge in their favour if the deed of the 1st of June, 1853, had released the old one; and I think

(1) 2 D. F. & J. 578. (2) 3 P. Wms. 280. (3) 2 De G. & J. 21. (4) 1 Drew. 193. (5) 5 Hare, 272.

it probable that such a case could be established if the contest were between *Walters*, and those claiming under him as volunteers, and the *Hunters;* but *Curling* had no notice of that correspondence, and it cannot therefore affect him. It was also argued that certain special circumstances which, it was said, if minutely examined, would have led to further inquiry, were sufficient to put Mr. *Curling's* advisers on further inquiry, and therefore to give him notice of the defect in *Walters'* title on the principle upon which *Kennedy* v. *Green* (1) was decided; but I think, for the reasons stated by Lord *St. Leonards* in *Marjoribanks* v. *Hovenden* (2), the decision in that case ought not to be extended, and I do not think there was enough to affect Mr. *Curling* with notice. His object was to obtain a temporary security only on the *Felling* estate, and it was sufficient for him if *Walters* was the owner of that estate, without going minutely into all the various transactions as to the lands which had formerly been part of it. I cannot accede to the argument that the Defendant *Lister*, who represents the creditors of *Brandling* under the deed of 1846, was not bound by the exercise of the power of sale by *Darnell*. He undoubtedly executed the power by the deed of the 1st of June, 1853, and if he did so improperly, *Lister's* remedy must be against his representatives. It does not, however, appear that *Lister* has any real interest in the question at issue in the suit.

I do not think it necessary to remark particularly upon the cases at law on the effect of negligence, which were cited by Mr. *Rigby*. I may, however, remark that some of them were not decided in accordance with the principles of this Court. *Tayler* v. *Great Indian Peninsula Railway Company* (3) was decided as it was on the ground, that as the purchaser did not acquire a good title under the blank transfers, the ultimate transferees of the shares had notice of the transfers having been executed in blank. They, therefore, took with notice; and it was upon that ground only that the decision was made.

That decision contrasts in a remarkable manner, I am bound to say, with the case of *Swan* v. *North British Australasian Company* (4). There all the Judges, except Mr. Justice *Keating*,

(1) 3 My. & K. 699.
(2) Dru. 21.
(3) 4 De G. & J. 559.
(4) 7 H. & N. 603.

V.-C. M. 1870 HUNTER v. WALTERS. CURLING v. WALTERS. DARNELL v. HUNTER.

decided that transfers executed in blank, handed over to the transferee, who neither had notice nor possibly could have notice of the circumstances under which they were executed, did not give a good title. Mr. Justice *Keating* dissented from the rest of the Court, and I am bound to say, if I had been a member of the Court, that I should entirely have agreed with him. The case is in contrast with the case of *Tayler* v. *Great Indian Peninsula Railway Company* (1), where the decision was against transferees solely on the ground that they had notice that the transfers had been executed in blank.

I am of opinion, in accordance with what was decided by Sir *John Leach* and Lord *Brougham* in *Kennedy* v. *Green* (2), that the estate did pass to *Walters* by the deed of the 1st of June, 1853. There was no mis-statement by *Walters* as to the nature of the deed, and it was the fault of Mr. *Darnell* and Mr. *Hunter* themselves not to ascertain its nature, to which their attention was in a marked manner called by the receipts which they signed. *Walters'* letter of the 31st of January, 1853, to *Hunter*, telling him that the estate was sold, and that he would be paid off in six months, was also calculated to put him on his guard.

I am, therefore, of opinion, upon the whole case, that the Plaintiff, Mrs. *Curling*, has established the priority of her charge on the *Felling* estate, and it must be declared accordingly.

There is no case for varying the order of priority between *Hunter* and *Darnell*, which is settled by the dates of their securities. There will be an order for sale of the estate, with a declaration of priorities, and with that decree every one of the mortgagees will add their interest and costs to their securities. They will stand in this order: first, *Curling;* second, *Hunter;* third, *Darnell;* and there will be one decree in all three suits.

Solicitors for *Hunter:* Messrs. *Farrer, Ouvry, & Co.*
Solicitors for *Curling:* Messrs. *Dean & Taylor.*
Solicitor for *Darnell:* Mr. *J. Crowdy.*
Solicitor for *Walters'* Representatives: Messrs. *Hillyer & Fenwick.*
Solicitor for *Catherine Walters:* Mr. *Clayton.*

(1) 4 De G. & J. 559. (2) 3 My. & K. 699.

In re HERCULES INSURANCE COMPANY.

V.-C. M.
1871
Jan. 20.

Winding-up—Unregistered Company—Registration after Commencement of Liquidation—Vesting Order—Companies Act, 1862, s. 203.

After the presentation of a Petition to wind up an unregistered company, the company was registered under the *Companies Act*, 1862, with a view to a voluntary winding-up. An order having been subsequently made on the Petition:—

Held, that, notwithstanding the registration, the company was an unregistered company within the meaning of sect. 203 of the Act of 1862, and order made vesting in the official liquidator certain legal estates in securities outstanding in trustees for the company, to be dealt with in the winding-up.

BY an indenture dated the 8th of July, 1868, the business, assets, and liabilities of the *International Life Assurance Society*, which was at the time an unregistered company, together with the freehold estates comprised in the mortgages and other securities of the society, whether mentioned or specified in a schedule to the deed or not, were assigned to the *Hercules Insurance Company, Limited*. The legal estate, however, in the same mortgages and securities remained outstanding in various trustees for the society, but the deeds relating thereto were handed over to the *Hercules Company*.

On the 14th of November, 1868, a Petition was presented to wind up the *International Society*, which, on coming to a hearing, was adjourned from time to time.

Pending these adjournments, and with a view to a voluntary liquidation, on the 8th of February, 1869, a resolution was passed at a meeting of the *International Society*, called for the purpose, to register it as an unlimited company under the *Companies Act*, 1862, and on the 15th of February, 1869, the Registrar of Joint Stock Companies, who was not informed of the presentation of the Petition, registered the society.

On the 18th of January, 1869, a resolution was passed, which was duly confirmed on the 3rd of February, 1869, to wind up the *Hercules Company* voluntarily under the supervision of the Court, and on the 23rd of January, 1869, a supervision order was made by the Court.

On the 19th of February, 1869, an order was made on the Petition to wind up the *International Society* compulsorily.

V.-C. M. 1871 *In re* Hercules Insurance Co.

An agreement was made on the 30th of January, 1870, to transfer the business of the *International Society* and the *Hercules Company* to the *Prudential Assurance Company*, and on the 23rd of March, 1870, the sale was approved by the Court; and by an agreement also approved by the Court, the *Prudential Company* undertook all the liabilities of the *International Society*.

Pursuant to an order of the 29th of March, 1870, the securities of the *International Society* were handed over to the *Prudential Company*.

A Petition was now presented by the liquidator of the *Hercules Company*, praying that the Court would express its opinion, that the registration of the *International Society*, on the 15th of February, 1869, was an alteration of the *status* of members of the society within the meaning of the 153rd section of the *Companies Act*, 1862, and was void; and that, notwithstanding such registration as aforesaid, the legal estate in all the securities and property specified in the schedule annexed to the Petition might, pursuant to the 203rd section of the *Companies Act*, 1862, vest in the official liquidator of the *International Society*, for the purpose of carrying into effect the order of the 29th day of March, 1870, and enabling the official liquidator of the society to do all acts necessary, and execute all requisite deeds, for vesting in the *Prudential Company* the above-mentioned securities.

Mr. *Cotton*, Q.C., and Mr. *E. S. Ford*, in support of the Petition:—

The order to wind up a company relates back to the presentation of the Petition, and consequently the Court is not bound by the certificate of registration: *Re Northumberland and Durham District Banking Company* (1).

The company, when the Petition was presented, was subject to Part VIII. of the *Companies Act*, as being unregistered; and therefore, though actually registered, may be dealt with as an unregistered company.

[The Vice-Chancellor:—It appears to me that the term "unregistered company" in the *Companies Act*, means a company unregistered at the date of the Petition to wind up. For the pur-

(1) 2 De G. & J. 357.

pose of the order, the *Prudential Company* will be safe if the Court is satisfied.]

Mr. *Glasse*, Q.C., and Mr. *Higgins*, for the official liquidator of the *International Society*, supported the prayer of the Petition.

Mr. *Phear*, for the *Prudential Company*:—

The object is to get in the securities for the benefit of the *Prudential Company*, and they could not with safety be advised to take the title without further consideration. The order asked for, not being on a decision between adverse parties, would not conclude future objections. The only mode of vacating the registration would be by a mandamus, and if the registration is not vacated, it might be said that there was no jurisdiction to make the order. Possibly a mandamus might be obtained if the Court could see the way to declare the registration improper.

SIR R. MALINS, V.C.:—

I think that by an "unregistered company" is meant a company unregistered at the date of the commencement of the winding-up; and that a subsequent registration must be a mere nullity. The order may therefore be made as prayed for, with an introductory statement of the opinion of the Court.

The order, as drawn up, was in the following form:—

And it appearing that the said society was registered after the presentation of the Petition on which the order for winding up the said society was made, and the Court being accordingly of opinion that, notwithstanding such registration, the said society is an unregistered company within the meaning of the 203rd section of the *Companies Act*, 1862, this Court doth order that, notwithstanding such registration, all such property, real and personal, &c., do vest in the official liquidator of the *International Life Assurance Society*, to do all acts necessary, and execute all requisite deeds, for vesting in the *Prudential Assurance Company* the said property and things in action pursuant to that order.

Solicitors: Messrs. *Merriman & Co.*; Mr. *John Tucker*; Messrs. *Barnard & Co.*

V.-C. M.

1871

Jan. 27.

In re CUNYNGHAME'S SETTLEMENT.

Appointment—Remoteness—Married Woman—Restraint on Alienation beyond legal Limits.

Under an ante-nuptial settlement, by which the husband had a power of appointing a sum of money among the children of the marriage, he appointed the fund to the separate use of a married daughter, with a restriction against alienation:—

Held, that the appointment to the separate use of his daughter was valid, discharged of the restraint upon alienation, which was too remote and void.

BY a settlement made on the marriage of Sir *David Cunynghame* with *Annie*, his late wife, dated the 9th of July, 1833, sums of £20,000 and £6000 were settled upon trust to pay the income to Sir *D. Cunynghame* for life, and after his decease to his wife for life, and after their respective deaths in trust for such one child, or for such two or more, or all and every of the children of the marriage, to be a vested interest or vested interests in, and paid or transferred to such child or children respectively at such age or ages, days and times, and in such parts, shares and proportions, manner and form, and subject to, with, and under such powers, provisoes, conditions and restrictions, and limitations over, as the husband and wife should jointly appoint; and in default of such joint appointment, then as Sir *D. Cunynghame*, in case he should survive his said wife, should at any time or times, after the decease of his wife, by deed or will appoint.

There were three children of the marriage, namely, *Edward Augustus*, *Maria Louisa*, now the wife of *Henry Evans*, and *Augusta*. Lady *Cunynghame* died in June, 1864.

By a deed-poll, dated the 13th of June, 1866, Sir *D. Cunynghame*, in exercise of the power given to him by the settlement of July, 1833, directed and appointed that, subject to the trusts in such settlement declared in favour of him during his life, the sum of £6000, part of such trust funds, should be held in trust for the said *Mary Louisa Evans*, her executors, administrators and assigns, the same to be an interest absolutely vested in her immediately upon and after the execution of the said deed, for her sole and separate use, independently and exclusively of the said *Thomas Henry*

Evans, or any future husband, and without being subject to his debts, control or engagements, and her receipts to be good discharges for the same. But, nevertheless, that she should have no power to mortgage, sell, or otherwise dispose of the same, or any part thereof, in the way of anticipation.

Upon the death of Sir *D. Cunynghame*, the trustees of the settlement were applied to to pay over the £6000 to Mrs. *Evans*, which, upon the advice of counsel, they declined to do without having the opinion of the Court. The money was consequently paid in under the *Trustees Relief Act*, and a Petition was now presented by Mrs. *Evans*, by her next friend, that the money so paid in might be paid to the Petitioner on her sole receipt.

Mr. *C. Hall*, in support of the Petition:—

The question raised is, whether it was competent for Sir *D. Cunynghame* to exercise his power of appointment among his children in such a form as to restrain the appointee from alienating the property during her life. As the settlement creating the power was ante-nuptial, the daughter was not then in existence, and a restraint upon alienation during her life must consequently extend beyond a life or lives in being. *In re Teague's Settlement* (1) is a case identical with the present, and there it was held that the restraint on alienation during the appointee's lifetime was invalid, but the appointment was otherwise a valid execution of the power. So, in *Armitage* v. *Coates* (2), where a bequest was made to persons *in esse* for life, with remainder to their unborn children, with a general direction that the female children should take for their "separate and inalienable use," such restriction against alienation was too remote and void.

It may, however, be considered that this appointment was intended only to restrain the disposition of the capital during the life of the appointor. The deed is made to take effect immediately, subject to Sir *D. Cunynghame's* life interest, and the restraint on alienation prior to the appointee's interest coming into possession would be effectual.

Mr. *H. M. Sladen*, for the husband of the Petitioner.

(1) Law Rep. 10 Eq. 564. (2) 35 Beav. 1.

V.-C. M. 1871 *In re* CUNYNGHAME'S SETTLEMENT.

Mr. *Jason Smith*, for the trustees:—

Whether, upon principle, the restriction on anticipation in ordinary cases would be inoperative, as tying up the fund beyond the legal period, it is submitted that, with regard to married women, the authorities have gone so far in supporting such restraints that the Court is bound by the decided cases. In *Thornton* v. *Bright* (1) the settlement was very similar to the present, and it was held that the appointment of an estate to trustees for the separate use of a married daughter during the joint lives of herself and her husband, without power of anticipation, was a valid exercise of the power; and in *Dickinson* v. *Mort* (2), where the donee of a power appointed to a married daughter for her separate use, with a restraint on anticipation during the coverture, it was held that the interest of the appointee might lawfully be so restricted by the terms of the power. It is true that, in *Fry* v. *Capper* (3), the judgment indicated that the restraint on anticipation might be rejected, and the appointment to the separate use of a married daughter for life was held to be a valid execution of the power; but in that case the two authorities before cited do not appear to have been brought to the attention of the Court, and the Judge refused to declare that the restraint on anticipation was invalid. *Carver* v. *Bowles* (4) is an authority to the same effect. It was there held that an attempt to restrict the interests of the daughters by limitations to their separate use, without power of anticipation, was good. The decision of the Master of the Rolls in *Armitage* v. *Coates* (5) is not opposed to these cases, although His Lordship stated his impression to be, that the restraint on anticipation was invalid.

In the case of *In re Teague's Settlement* (6), the restraint extended beyond the coverture of the appointee, as it was directed that, after her decease, the property should be held in trust for such persons as she should by deed or will appoint.

The ground upon which the Court has acted, in allowing the restriction in the case of a married woman, is the *status* of the party, which requires an unusual amount of protection. It is allowed to a person executing such a power as this to appoint to

(1) 2 My. & Cr. 230.
(2) 8 Hare, 178.
(3) Kay, 163.
(4) 2 Russ. & My. 301.
(5) 35 Beav. 1.
(6) Law Rep. 10 Eq. 564.

the separate use of a married daughter, and the restraint on anticipation is quite as necessary for the purpose of protection.

SIR R. MALINS, V.C.:—

As far as the appointment made by Sir *D. Cunynghame* is in trust for his daughter, her executors, administrators, and assigns, absolutely, to be vested in her immediately for her sole and separate use, independently and exclusively of her husband, it is free from any objection. It makes her capable of disposing of the fund without being subject to the debts, control, or engagements of her husband. But the difficulty arises upon the subsequent words: "But, nevertheless, she shall have no power to mortgage, sell, or otherwise dispose of the same, or any part thereof, in the way of anticipation." Now that restraint would have been valid if *Mary Louisa* had been in existence at the date of the instrument creating the power; but is it within the power for the father to appoint among his unborn children, restraining them from alienation?

I think it is not, because the restraint on alienation is during the life of a person unborn: it is a restraint which may extend beyond a life or lives in being. Here it must extend to the whole life of the daughter, who was not in existence at the date of the instrument creating the power. Suppose it had been declared that, if she did at any time sell or dispose of the property, it should go over to some other person, would that be good? Clearly not, because this would be an attempt to create a limitation to take effect at any time during the life of a person unborn. If this were allowed, the property would be inalienable for the whole of a life unborn. I considered this subject very fully in *Stuart* v. *Cockerell* (1).

I am of opinion that, upon principle, this is an invalid exercise of the power so far as it restrains alienation; but cases have been cited which are relied upon.

As to *Thornton* v. *Bright* (2), it was assumed that the property might be given to a married woman, and might be made inalienable; but the point was not argued. *Fry* v. *Capper* (3) gives no sanction to such a decision; but I am relieved from difficulty by the decision of Vice-Chancellor *James* in *In re Teague's Settle-*

(1) Law Rep. 7 Eq. 363. (2) 2 My. & Cr. 230.
(3) Kay, 163.

V.-C. M. 1871 *In re* CUNYNGHAME'S SETTLEMENT.

ment (1), where a similar power was executed in favour of a married daughter for her separate use for life, independently of her then or any future husband, but without power of anticipation; and after her decease, as she should generally by deed or will appoint, and in default of appointment, for her executors and administrators absolutely. There the Vice-Chancellor held that the whole appointment to the daughter was not void, and that it was a valid execution of the power, except as to the restraint upon anticipation, which was ineffectual and void.

I should have arrived at the same decision in the absence of authority, but the cases I have referred to confirm me in the opinion that the restraint on alienation is not within the power. Therefore the prayer of the Petition must be acceded to, and the money must be paid out to the Petitioner.

Solicitor for the Petitioner: Mr. *St. Barbe Sladen.*
Solicitors for the Respondents: Messrs. *R. S. Taylor & Son.*

(1) Law Rep. 10 Eq. 564.

ANDERSON *v.* PIGNET.

V.-C. B.
1870
Nov. 4;
Dec. 16;
1871
Jan. 13.

8 & 9 *Vict. c.* 112—*Satisfied Term—Dower.*

A., being lessee of land for ninety-nine years, created a term by way of mortgage, and subsequently acquired the fee. He afterwards became bankrupt. By agreement between his assignees in bankruptcy, himself, and the mortgagee, a deed was executed by which the mortgage debt was released, and the fee simple was conveyed to the mortgagee freed and discharged from all equity of redemption:—

Held, upon demurrer to a bill for dower by *A.*'s widow (married in 1832), that upon the release and extinction of the mortgage debt the term which was created for the purpose of securing that debt became a satisfied term within 8 & 9 Vict. c. 112, s. 2, and afforded no protection against the claim of *A.*'s widow to dower.

Reversed by L. C. & L. JJ. 2 R. & Ch. 180.

DEMURRER.

The bill, which was filed for the purpose of enforcing the Plaintiff's right to dower out of land of which her late husband *Richard Anderson*, deceased, was seised for an estate in fee simple in possession during the coverture, contained the following statements:—

The Plaintiff was married on the 4th of September, 1832, and no settlement or agreement for a settlement was made either before or after the marriage.

On the 10th of November, 1851, the land in question was demised by *James Rhodes* to *Richard Anderson* for the term of ninety-nine years, from the 25th of March, 1851; and shortly after this demise two cottages were built by *Anderson* on the land.

On the 14th of November, 1851, the land and the cottages, then in course of erection, were demised by *Anderson* to *Mary Marshall* for the then residue of the term of ninety-nine years, less ten days, by way of mortgage for securing payment by *Anderson* to *Mary Marshall* of certain moneys and interest.

On the 12th of January, 1852, *Anderson* demised the land and the cottages thereon to *F. W. Dolman* for the residue of the then term of ninety-nine years, less ten days, by way of mortgage.

On the 19th of May, 1852, *Anderson* demised the premises to

V.-C. B. 1870–1

ANDERSON v. PIGNET.

James Buckell for the residue of the ninety-nine years' term, less five days, by way of mortgage.

On the 29th of July, 1852, *Anderson* demised the premises by way of mortgage to *J. E. Green* and *E. Randell* for the residue of the ninety-nine years' term, less three days.

On the 4th of April, 1853, *Anderson*, *J. E. Green*, and *E. Randell*, according to their estate in the premises, and with the concurrence of *Buckell*, demised and confirmed the premises unto *A. M. Matthews*, as a trustee for *Green* and *E. Randell*, for the residue of the ninety-nine years' term, less ten days.

On the 1st of August, 1853, the property was conveyed by *Rhodes* to *Anderson* in fee.

On the 8th of November, 1853, *Anderson* was declared bankrupt, and assignees were appointed.

In February, 1854, *Dolman's* mortgage of January, 1852, and *Marshall's* mortgage of the 14th of November, 1851, having been paid off, *Dolman*, by deed of the 1st of February, and *Marshall*, by one of the 9th of February, 1854, surrendered the land comprised in the original demise of the 10th of November, 1851 (*Rhodes* to *Anderson*), to the intent that the terms created therein by the indentures of the 12th of January, 1852, and the 14th of November, 1851, might be merged.

By indenture of the 24th of February, 1854, *Buckell's* executors, after reciting that *Buckell's* mortgage (19th of May, 1852) had been paid off, and that a large sum still remained due and owing to *J. E. Green* and *E. Randell* (29th of July, 1852), assigned to *William Randell*, in trust for *J. E. Green* and *E. Randell*, the land in question for all the residue then unexpired of the term created therein by the indenture of the 19th of May, 1852.

By indenture of the 19th of May, 1854, reciting that money was still owing to *Green* and *Randell* on the security of the indenture of the 29th of July, 1852, and that the terms created by *Marshall's* mortgage and *Dolman's* mortgage of 1852 were not merged by the indentures of the 1st and 9th of February, 1854, because the terms granted by *Anderson* to *Buckell* (19th of May, 1852) and *Green* and *Randell* (29th of July, 1852) prevented a merger, and that as it might be doubted whether the said first-mentioned terms, although satisfied, had ceased under the Act of 1845 for rendering the assign-

ment of satisfied terms unnecessary (8 & 9 Vict. c. 112), *Anderson*, at the request of *Green* and *Randell*, and so far only as regarded the estate and interest (if any) of *Anderson* in the premises so agreed to be surrendered by him under the indentures of the 1st and 9th of February, 1854, and not with a view of surrendering or granting any other estate or interest which he might otherwise have had or been entitled to in the premises, did surrender unto *William Randell* the land, &c., to the intent that the respective residues then unexpired and existing of the several terms respectively created therein by the indentures of the 14th of November, 1851, and 12th of January, 1852, might be merged and extinguished.

By indenture, dated the 28th of July, 1854, expressed to be made between *F. W. Dolman*, *Anderson's* assignees in bankruptcy, *Anderson* (and Plaintiff, his wife), *J. E. Green* and *E. Randell* (but which indenture Plaintiff refused to execute, and never did execute), in consideration of the release b y *Green* and *Randell* of their mortgage debt, *Dolman*, as for and concerning his interest under the deed of the 8th of August, 1853, granted and released, and *Anderson's* assignees granted and released, and *Anderson* granted, released, and confirmed (and it was expressed that Plaintiff, for the purpose of releasing and extinguishing her right of dower, released and disposed of) the premises unto *Green* and *Randell*, their heirs and assigns, discharged from all equity of redemption to which the premises might be subject under the indenture of the 29th of July, 1852, or otherwise.

The bill stated that the Plaintiff was not named as a party to this deed in the original draft; but on the draft being forwarded to *Dolman* (who was *Anderson's* solicitor) for approval, *Dolman*, without any instructions from Plaintiff, added her name as a party, and signed an approval of the draft, as altered, "for Mr. and Mrs. *Anderson* and self;" but Plaintiff never authorized *Dolman* to approve of such draft on her behalf, or to join her as a party thereto. On the engrossment being tendered to her for her execution she refused to execute it, and she now submitted and insisted that she was not bound thereby. She further submitted, that upon the execution of this indenture the term created by *Buckell's* mortgage (19th of May, 1852), which was by indenture of the 24th of February, 1854, assigned to *William Randell* in trust for *J. E.*

V.-C. B. 1870-1

ANDERSON v. PIGNET.

Green and *E. Randell*, became satisfied and attendant upon the inheritance, and that the term thereupon absolutely ceased and determined under 8 & 9 Vict. c. 112, and that thereupon the Plaintiff's inchoate right to dower attached. The bill also alleged that *Green* and *E. Randell* had full notice of the Plaintiff's inchoate right to dower at the time of executing the indenture of the 28th of July, 1854. Subsequently to that indenture *Green* and *E. Randell* granted the premises to Defendant (*Pignet*) in fee, who, as Plaintiff alleged, when he purchased the property was aware of her inchoate right to dower, and took an indemnity against the claim from *Green* and *E. Randell*, his vendors.

On the 23rd of May, 1861, *William Randell* and *A. M. Matthews*, at the request of the Defendant, and *Green* and *E. Randell*, so far as respected and related to the term of years created by the lease of the 10th of November, 1851, and the leasehold estate thereby demised, and all and every their, and each of their, term or terms, estate, right, and interest therein, but not further or otherwise (at the like request of Defendant), granted and confirmed unto *F. Carritt* the property for and during all the residue unexpired of the term of ninety-nine years created by the same indenture of lease, or for all and every or any other such term, estate, or interest as they, *William Randell, A. M. Matthews, J. E. Green*, and *E. Randell*, had in the same leasehold premises; in trust, nevertheless, for Defendant, his executors, administrators, and assigns, to be assigned or otherwise disposed of as he or they should direct, and subject thereto, in trust to permit the same to attend the freehold and inheritance. The bill charged that this indenture was wholly inoperative, inasmuch as the several terms thereby purported to be assigned to *Carritt* had become satisfied and merged or extinguished, and no estate or interest in the premises passed, or could pass, to *Carritt* thereby, and was an ineffectual attempt on the part of Defendant to interfere with Plaintiff's inchoate right to dower out of the premises, which right to dower was not in the least affected thereby.

Upon the death of *Anderson* the Plaintiff had filed her bill against *Pignet*, the purchaser from *Green* and *Randell*, to enforce her dower, to which, as was alleged, she then became entitled.

To this bill the Defendant had demurred.

Mr. *Joshua Williams*, Q.C., and Mr. *T. A. Roberts*, in support of the demurrer:—

According to the old law the purchaser for valuable consideration might protect himself, by the assignment of outstanding mortgage terms prior to the right to dower, against any demand in respect of dower: *Wynn* v. *Williams* (1). Then, upon the new law since 1845, the *Satisfied Terms Act* (8 & 9 Vict. c. 112) deals only with satisfied terms; and before the Plaintiff's inchoate right to dower can take effect by the extinguishment of the term by operation of the statute the term must become satisfied, must become attendant, and attendant upon the freehold and inheritance by construction of law or by express declaration. But the term which was outstanding for protection of the mortgagees did not become attendant, nor was it satisfied by the release of the 28th of July, 1854: *Doe* v. *Jones* (2); the intention of the Act being that terms assigned, or agreed to be assigned, as a protection to a mortgagee or purchaser should not be merged: *Shaw* v. *Johnson* (3).

[Mr. *Kay*, Q.C., called attention to another report of *Shaw* v. *Johnson* (4), from which it appeared that the assignment took place before 1845, so that the term was not a satisfied term.]

The intention of the parties must be looked at: *Owen* v. *Owen* (5). A term only becomes attendant when it is for the benefit of the purchaser that it should be so, and where it would be more beneficial to the person entitled to the land and the charge to keep the charge on foot the Court will presume that he intended that the term should not be merged: *Forbes* v. *Moffatt* (6); *Richards* v. *Richards* (7); *Lewin* on Trusts (8).

The form of the subsequent assignment of the term (23rd of May, 1861) in trust for *Pignet*, "his executors, administrators, and assigns," shews an intention to keep the term on foot, and rebuts the presumption that it had become merged in the inheritance: *Gunter* v. *Gunter* (9); and, generally, a surrender of a term which

(1) 5 Ves. 130.
(2) 18 L. J. (Q.B.) 260.
(3) 1 Dr. & Sm. 412.
(4) 7 Jur. (N.S.) 1005.
(5) 3 H. & C. 88. 10 Jur. N.S. 884
(6) 18 Ves. 384.
(7) Joh. 754, 766.
(8) 5th Ed. p. 520.
(9) 23 Beav. 571. 2 Jur. N.S. 1013.

V.-C. B. 1870-1 ANDERSON v. PIGNET.

has been assigned to attend the inheritance will not be presumed, unless there has been a dealing with the estate in such a manner as is only consistent with the term having been put an end to: *Garrard* v. *Tuck* (1). In the case of a purchase by the first mortgagee of the equity of redemption, his priority over a second mortgagee is not thereby lost: *Hayden* v. *Kirkpatrick* (2); and here the general expressions in the deed of release will not be extended so as to destroy the protection afforded by the term against the Plaintiff's claim to dower, and must be limited by the manifest intention of the parties: *Lee* v. *Lockhart* (3); *Lindo* v. *Lindo* (4). There may be a release of the debt, *quâ* debt, without any intention on the part of the releasor to destroy the charge as between his real and personal representatives: *Phillips* v. *Gutteridge* (5). But in any case the Plaintiff has no equity. The deed of July, 1854, was prepared on the footing of her joining in it (for the purpose of releasing her dower), was approved on her behalf, and executed on the faith that she would execute and be bound by it; and if she is not, or cannot, be bound by it, it is not binding on any of the other parties to it: *Woodcock* v. *Monckton* (6); *Peto* v. *Peto* (7); *Bolitho* v. *Hillyar* (8).

Mr. *Kay*, Q.C., and Mr. *W. W. Karslake*, in support of the bill:—

Upon the bankruptcy of *Anderson* the terms passed out of him to his assignees, and they, by the conveyance to *Green* and *Randell* in fee (28th of July, 1854), assigned all their terms and interest, so that the effect of the conveyance to *Green* and *E. Randell* in fee simple, and the release by them of their mortgage debt, was, that the terms became not only satisfied, but attendant upon the inheritance, and by force of sect. 2 of 8 & 9 Vict. c. 112, extinguished, so as to afford no protection to a purchaser against the Plaintiff's claim to dower, which she refused to release on the occasion of *Green* and *Randell's* purchase.

Under the old law, whenever a term would merge in the inherit-

(1) 18 L. J. (C.P.) 338.
(2) 34 Beav. 645.
(3) 3 My. & Cr. 302.
(4) 1 Beav. 496.
(5) 4 De G. & J. 531.
(6) 1 Coll. 273.
(7) 16 Sim. 590.
(8) 34 Beav. 180.

ance, if both were in the same person, it shall be considered as attendant upon the inheritance: *Cruise*, Dig. (1); *Capel* v. *Girdler* (2); and a term outstanding in a trustee to attend the inheritance would not protect a purchaser from dower, unless the term was actually assigned to a trustee for him: *Maundrell* v. *Maundrell* (3); and though a term might prevent the enjoyment, it did not take away the right to dower: *Mole* v. *Smith* (4). We say that the deed of the 23rd of May, 1861, was an ineffectual attempt to revive terms which had become satisfied and extinguished, and did not interfere with the Plaintiff's claim to dower.

Mr. *Williams*, in reply.

Sir James Bacon, V.C.:—

Upon this demurrer I can only ask myself the question, whether upon the statements contained in the bill the Plaintiff may be entitled to some relief at the hearing or not; the demurrer asserting a negative answer to that question. As to the facts, the case is simple enough. The term which has been so much discussed was created at the time when the late husband of the Plaintiff was himself only a termor, and had a chattel interest; but he subsequently acquired the fee simple in the property comprised in the term. The moment that took place, as is admitted, and of course cannot be disputed, what is called the inchoate right of the Plaintiff to her dower took effect. That right to dower is one which she could deal with—no doubt she could release it in the proper way—but it was one which no external circumstances could affect in any way whatever so as to disparage it. She remained perfectly silent and supine during the further transactions which take place. Then comes a time when the husband, having mortgaged over and over again the term of which he was possessed before he acquired the fee, became bankrupt. Thereupon a bargain is made between the *cestuis que trust* of the term, the mortgagees, and the assignees of the bankrupt, who had a right to redeem the mortgage, that upon having a full release of the mortgage debt, and all the estate and interest of the bankrupt,

(1) Tit. xii., ch. iii., s. 20.
(2) 9 Ves. 509.
(3) 7 Ves. 567; 10 Ves. 246.
(4) 1 Jac. & W. 665.

V.-C. B. 1870–1 ANDERSON v. PIGNET.

they, the assignees, will convey the fee simple to the mortgagees. Accordingly that is done, and in terms so plain that there can be no doubt as to the effect and operation of the deed for the purpose of the demurrer—whether upon an answer being put in any other state of things could be suggested is not now to be speculated upon. The deed of the 28th of July, 1854, conveys the fee simple "freed and discharged from all equity of redemption to which the premises might be subject under the indenture of the 29th of July, 1852, or otherwise as in the indenture was mentioned." And it was by the indenture further witnessed, that in consideration of the grant (and an assignment of other property not affecting the matters in question in this suit) thereinbefore contained, *J. E. Green* and *E. Randell* released the assignees, and the lands and tenements, estate and effects of *Anderson* from their mortgage debt. The term and the assignment of the term existed only for the purpose of securing payment of that debt before this bargain was made. The term is assigned to a trustee for the purpose only of securing that debt. By the effect of this deed that debt is satisfied and put an end to, and the term could only exist after that for the purpose of the inheritance, which was acquired under this deed. Within the very terms of the Act (8 & 9 Vict. c. 112) it is a satisfied term; and if it be a satisfied term, if it exists no longer, what impediment or obstacle is there to Plaintiff's claim for dower? While the term subsisted she could not of course claim dower until the expiration of the term. By the act of the purchasers that obstacle is removed. The law takes effect, and she becomes entitled to dower as soon as her husband shall die. I cannot doubt either, as to the tenor and effect of the deed, or as to the effect of the Act of Parliament. That that was the understanding between the parties I do not permit myself to doubt, though, also, I do not permit myself to speculate. It appears that the deed was prepared properly enough to contain a release of Plaintiff's dower. She alleges upon the bill, and it must be taken to be true, that it was an imposition upon her, that it was an unauthorized use of her name, an unauthorized dealing with her interest. *Randell* and *Green*, who then dealt with the property, must have known that perfectly well. They knew it from the tenor of the deed. They

may have been content to run the risk. Certainly the risk was run for some time, because it was not till a good while after that that the assignment of the term under which it is said to be vested in *Carritt* took place.

In my opinion the Plaintiff's claim, as stated upon the bill, is one which must be disproved before the bill can be dismissed. It cannot be dealt with upon demurrer, because the larger portion of the argument addressed to me relates to circumstances which, for aught I know, may or may not have a bearing upon the case when it comes to be heard.

All that requires to be answered; all the equities which arise upon such a deed must be discussed at the hearing; upon demurrer I cannot attend to them. I can only consider it as a case plainly falling within the terms of the statute; a plain release, extinction, and satisfaction of the mortgage debt for which alone the term was created, and for which alone it can subsist. The subsequent assignment I take to be a mere nullity. For the reasons I have stated, viz., that a plain release of the mortgage debt, for securing which the term was created, has been executed by the then purchaser with full knowledge of all the circumstances, and that there is nothing to throw a doubt or question upon any part of the transaction, I hold that there has been a dealing with the property the legal consequence of which was, that the Plaintiff's inchoate right to dower was then accelerated by the removal of that which before was an impediment. The Defendant must answer the bill.

Demurrer overruled.

Solicitors: Mr. *W. H. Waller;* Mr. *R. W. Roberts.*

V.-C. B.

HARRISON *v.* GOOD.

1871

Jan. 17, 18, 20.

Vendor and Purchaser—Covenant—Words—"Nuisance"—"Adjoining" Property—Injunction—Establishment of a District National School not a Nuisance.

A vendor of a piece of land took from the purchaser a covenant that he would not do, or suffer to be done, on the premises, or any part thereof, anything which should be a nuisance to the vendor or his tenants, or the occupiers or owners of the "adjoining" property, or the houses to be built thereon. The purchaser, immediately after the sale, put up the piece of land again for sale by auction in lots, under conditions which required each purchaser to enter into a covenant in similar terms to the above; and each of the purchasers did enter into a covenant with his vendor that he would not do or suffer to be done on any of the premises anything which should, would, or might be deemed a nuisance to the original vendor, or the occupiers or proprietors for the time being of the "adjoining" property, or the houses to be built thereon:—

Held, that by the word "adjoining" in the last-mentioned covenant was meant the property adjoining each lot, and not merely the property adjoining the whole piece of land originally sold; and that the owner of any lot was entitled to enforce the covenant against the owner of any other lot.

The owner of one of the lots having made a free gift of the same to the committee of a district national school, for the purpose of having a national school erected thereon:—

Held, that the word "nuisance" in the covenant must be restricted to its technical meaning (1); that the establishment of a national school is not a legal nuisance; and that the establishment of such a school on one of the above lots could not be restrained by the owner of a dwelling-house built on an adjoining lot, though his property would be depreciated thereby.

THIS bill was filed by *John Dangerfield*, a solicitor, and the resident owner of a house, 29, *Abbey Place*, in the parish of *Marylebone*, *Middlesex*, and *Charles Harrison* and *Abraham Dangerfield*, his trustees, and by *Frederick Hargrave Grey*, gunmaker, owner of a house, No. 5, in the same *Abbey Place*, against *Joseph Henry Good*, architect, and treasurer of the schools below mentioned; *Sidney Henry Widdrington* (since deceased), incumbent, and *Thomas Henry Filmer*, churchwarden of the district church of *St. Mark*, in the parish of *Marylebone*; and nine other Defendants, members of the committee of management of *St. Mark's Parochial Schools*.

In the year 1824 *Henry Gore Chandless* purchased from the

(1) See the judgment of Sir *William Erle*, in *Brand* v. *Hammersmith and City Railway Company* (Law Rep. 2 Q. B. 247.)

then owners of the *Eyre* estate a piece of land, which included the site on which the houses in *Abbey Place* had since been erected; and by the conveyance on such sale, dated the 8th and 9th of June, 1824, Mr. *Chandless*, for himself, his heirs, executors, administrators, and assigns, covenanted with *Walpole Eyre*, his heirs and assigns, that he, his heirs or assigns, should not "do or suffer to be done on any of the said ground and hereditaments hereby granted or released, or on any part thereof, anything which shall be a nuisance to the said *Henry Samuel Eyre*, or any of his tenants, or the occupiers or owners of the adjoining property, or the houses to be built thereon."

In May, 1824, Mr. *Chandless* put up the above piece of ground for sale by auction, in thirty-four lots, subject to conditions, one of which was, so far as material, as follows:—

"The purchasers of each lot shall, so as to bind the owners for the time being thereof, enter into a covenant with the vendor, . . . not to do or suffer to be done on the ground anything which will be a nuisance to *Henry Samuel Eyre*, Esq., or any of his tenants, or the occupiers of the adjoining property" . . .

Three of these lots now formed the site of 29, *Abbey Place*, and were purchased by a person who was the predecessor in title of the two second named Plaintiffs as trustees for the Plaintiff *John Dangerfield;* another was purchased by a predecessor in title of the Plaintiff *Grey;* and two others were purchased by *John Thurlow*, who was the predecessor in title of the Defendant *Good.*

The conveyance to *Thurlow* was dated the 23rd and 24th of July, 1824. It recited the sale by *Eyre* to *Chandless*, and the sale by auction by *Chandless*, and referred to a plan in which the property was described as having been sold in thirty-four lots; and after the operative part of the deed, contained the following covenant:—

"The said *John Thurlow* doth hereby for himself, his heirs, executors, and administrators, covenant with the said *Henry Gore Chandless*, his heirs and assigns, that he, the said *John Thurlow*, his heirs or assigns, shall not do or suffer to be done on any of the premises hereby appointed, granted and released, or intended so to be, or any part thereof, anything which shall, will, or may be

V.-C. B. 1871 HARRISON v. GOOD.

deemed a nuisance to *Henry Samuel Eyre*, or any of the tenants, or the occupiers or proprietors for the time being of the adjoining property, or the houses to be built thereon" . . .

Each of the conveyances to the purchasers of the other lots contained a similar covenant.

The house No. 29, *Abbey Place*, was erected by Mr. *Dangerfield* on a lot immediately opposite the site now belonging to Mr. *Good* at a cost of upwards of £6000. Mr. *Grey's* house, No. 5, was also a valuable house, immediately adjoining the site belonging to Mr. *Good* (which, in the numbering of the street, was counted as Nos. 6, 7, and 8), on the same side of the road.

In 1847 the district parish of *St. Mark's, Marylebone*, was formed; and shortly afterwards national and parochial schools were established for the district. These were at first held in *Marlborough Place*, in the same district; but owing to a petition or memorial presented by the inhabitants of the street and neighbourhood to the managers of the schools, they were from and after Michaelmas, 1869, discontinued to be held there.

This memorial was not forthcoming, and was stated to be lost. The Plaintiffs, in their bill, alleged that it represented the schools to be a nuisance and annoyance, and an injury to the neighbouring property. The Defendants, on the other hand, by their voluntary answer, said that it was prepared by an inhabitant, who complained of the mismanagement, or want of management, of the schools. Evidence was produced in support of either statement.

In the year 1867 the vestry of the district contemplated the erection of a new school on some vacant ground adjoining *St. Mark's Church*, which stands at the western end of *Abbey Place*, where it meets *Upper Hamilton Terrace;* and on the 16th of January in that year they passed a resolution empowering and directing the school committee to take immediate steps to erect new school buildings on that ground. In the autumn of the same year the Defendant, Mr. *Widdrington*, wrote to the Plaintiff, Mr. *Charles Harrison* (who was one of the trustees of the church ground), asking whether he saw any objection to the schools being built on the church ground, or any difficulty in the case. Mr. *Harrison* replied that there was no objection on the part of the trustees; and to a letter on the same subject, addressed to him in December,

1867, by Mr. *Good*, Mr. *Harrison*, on the 12th of December, 1867, answered that he was instructed by Mr. *East*, one of his co-trustees, to say, as already signified to Mr. *Widdrington*, that he had no objection whatever to the erection of the proposed school on the south-east corner of the church ground, provided it should be approved by him, Mr. *Widdrington*, and the tenants and occupiers of the houses in the neighbourhood. Subscriptions were raised, and plans were prepared by Mr. *Good* himself, but the scheme was, in the year 1868, abandoned.

The Plaintiffs alleged that if the Defendants chose, they might now erect proper parochial schools on this site, where the schools would not cause any nuisance or annoyance to any of the inhabitants of the district; and that the children could have access to the schools not only from the public street, but along a mews which led to the site.

The Defendants, on the other hand, said they had been advised that the trustees of the church ground would not be justified in allowing any portion of the ground to be appropriated for the erection of schools; also that the access by way of the mews would be dangerous to the children, and that there was no existing right of way through the mews, which was leasehold property.

The Plaintiff, Mr. *John Dangerfield*, in reply, maintained that power to grant a site was conferred upon the trustees of the church ground by the *School Sites Act* (4 & 5 Vict. c. 38).

Towards the end of the year 1869, Mr. *Good* offered to the school committee the above plot of land belonging to himself, as a free gift, for the purpose of having the schools erected thereon; and on the 22nd of November, 1869, it was resolved by the school committee that this offer be gratefully accepted.

The Plaintiff, *John Dangerfield* (who, on the 22nd of December, 1869, had been elected a member of the school committee), when he heard of the proposal, protested against it at the next committee meeting, and at first suggested that a house and premises, No. 70, *Carlton Hill*, then about to be sold by auction, should be purchased by the committee for the purpose; and upon this proposal being rejected, again recommended the church site.

At a school committee meeting, held on the 5th of January, 1870, Mr. *Dangerfield* received from the Defendant *James Farish*,

V.-C. B. 1871 HARRISON v. GOOD.

one of the committeemen, a memorandum to the effect that "Mr. *Good* should inspect the mews and state what extent would satisfy the requirements of the school, if Mr. *D.*" (meaning the Plaintiff) "could obtain as great an extent of the mews as above, and the fee simple of it, and arrange with Mr. *Good* to exchange the two sites, so that the munificent donation of ground should proceed from Mr. *Good* to the schools."

At a committee meeting, held on the 12th of January, after Mr. *Dangerfield* had addressed the meeting, deprecating the plan of building on Mr. *Good's* site, and urging a return to the church site, a resolution was passed that the meeting be adjourned till that day week, "to enable Mr. *Dangerfield* to bring forward some definite substantial proposition providing ground now occupied by a portion of the mews adjoining the church ground, at least forty feet in depth, and making it freehold, in addition to obtaining consent to building on the church ground adjoining, or such other freehold ground of sufficient extent, and making good any subscriptions already paid or promised which might in that case be withdrawn. An amendment, proposed by Mr. *Dangerfield*, and seconded by the Defendant *Charles Dod* (who was the solicitor to the committee), that the meeting be adjourned to that day week, "to enable Mr. *Dangerfield* to bring forward some definite and substantial proposition for providing some elegible site in the place of the piece of ground in *Abbey Place*," was put and lost.

On the 16th of January Mr. *Good* wrote to Mr. *Dangerfield* a letter, which contained the following passage: "If you and your friends, who are interested in removing the site of the proposed school building, will come prepared at the next committee to substitute a portion of the mews adjoining the ground surrounding the church, with access to the same from the mews, I will support you, and will at the same time undertake to assure you that the vacant ground in *Abbey Place* shall be let for private residences, and for no other purposes. If you cannot provide any other site, I hope you will not obstruct the general business of the committee, as we have several matters requiring immediate attention."

On the 19th of January another meeting was held, at which the chairman said the committee were prepared to consider any proposition Mr. *Dangerfield* might submit; and he accordingly

addressed to them a statement, partly in writing, embodying his views as to the feasibility of erecting schools on the church site, protesting, on behalf of himself and his neighbours, on the erection on Mr. *Good's* site of anything which should be deemed to be a nuisance to himself and the neighbouring owners; and threatening, if he should be compelled to do so, to file a bill for an injunction. He read a letter from Mr. *Marrable*, the architect, expressing an opinion that there was ample room in the church ground for the proposed buildings. He also stated that he had obtained the consent of the Plaintiff, *Charles Harrison* (who was one of the church trustees) to a thoroughfare being made through the mews, and to a sale by him of any portion of the stables (Mr. *Harrison's* property), if required for the school, at a fair valuation. He also left a copy of an opinion of counsel for the consideration of the committee. Mr. *Dangerfield* having retired, the committee resolved that Mr. *Dod* be requested to obtain the opinion of counsel whether the schools proposed to be erected in *Abbey Place* would or could be deemed to be a nuisance within the meaning of the covenant or at common law, and whether any of the occupants of the adjoining neighbouring property could take action under the covenant.

On the 27th of January Mr. *Good* wrote to Mr. *Dangerfield*, soliciting from him, as a member of the committee, a contribution for the schools, and on the following day Mr. *Dangerfield* replied, offering, if the school were built on the church site, to subscribe £10 towards its erection.

At the meeting of the 28th of January it was resolved that the opinion of counsel which had been obtained should not be read to Mr. *Dangerfield;* that Mr. *Good's* offer of the ground should be thankfully accepted; and that the committee should forthwith proceed to build on the site offered by Mr. *Good.* At this meeting, which was held at Mr. *Good's* house, he being in the chair, Mr. *Dangerfield* offered to procure the written consent of Mr. *Harrison*, as given in the letter below; but Mr. *Good* used the expression, "It is too late."

On the 8th of February the Defendant *Charles Harrison* wrote to Mr. *Dangerfield*, saying that he had only just returned to town, and lost no time in writing to say there would be no objection on

V.-C. B. 1871 HARRISON v. GOOD.

the part of the trustees of the church (as already intimated to the parties) to their building a school upon the church ground, and if any of the stables in the adjoining mews, in which he had a leasehold interest, were wanted for the purpose, he should have no objection to sell them at a fair valuation.

Copies of this letter were sent to the chairman and secretary of the committee, but no answer was returned.

Formal notice of legal proceedings was given by the Plaintiffs on the 8th of March, and on the 17th the bill was filed, alleging that it would "not be possible by any system of management" to prevent the children from "congregating in large numbers, and from playing outside the schoolhouse, and from making a great noise and disturbance, and dirt, and conducting themselves offensively and indecently, to the serious annoyance and discomfort of the Plaintiffs, *John Dangerfield* and *Grey*, and of the other persons residing on the various lots" sold in 1824; and charging that the school, if established on the *Abbey Place* site, would "greatly diminish the value of the respective properties aforesaid," and would "necessarily and inevitably become and continue a grievance and permanent nuisance to the Plaintiffs" aforesaid, "and the other occupiers of the property adjoining, and in the immediate neighbourhood of the new site."

The bill prayed for an injunction to restrain "the Defendants, their architects, builders, servants, and agents, from establishing any national or parochial schools" on the site in question, "and from doing, or suffering to be done upon the said premises, anything which shall be or be deemed to be a nuisance to the Plaintiffs, or any of the tenants or the occupiers for the time being of the property adjoining the said premises, or the houses built on such adjoining property" (following what was then supposed to be the exact language of the covenant).

Before the date of the filing of the bill, contracts had been entered into for the erection of temporary schools on the site, and these temporary buildings had since been completed.

In April, 1870, the committee adopted a number of rules for the conduct and management of the schools, amongst which was one that the schools were "under the superintendence and management of the clergy and a committee of gentlemen resident in the

neighbourhood;" another that the children were to be "in the school every morning at 9 A.M., with clean hands and face, their hair neat," &c.; the boys' school was to close at 12 A.M., the girls' at 12.15 P.M. Both schools to open in the afternoon at 2 P.M., and to close, the girls' at 4.15 P.M., the boys' at 4.30 P.M. The last rule was as follows: "The committee especially desire that every effort be made and precaution taken to insure quiet and orderly entrance into and departure from the school premises. The scholars, on leaving, are to be sent in order out of *Abbey Place* under the charge of the pupil teachers; and children who are guilty of noisy or refractory behaviour in coming to or returning from the school will be immediately punished, and on repetition of such conduct will be liable to expulsion."

The motion for injunction, adjourned from the 2nd of June, was, on the 16th of June, ordered to stand over for three weeks, on a continued undertaking; and on the 27th of June the Defendants filed a voluntary answer, submitting that the schools would not be a nuisance.

The present hearing was on motion for decree.

The Plaintiffs' case, as to the fact of the schools being an annoyance, was supported by the evidence of residents in *Abbey Place*, who considered that the schools would be a nuisance in many ways to themselves and their families; also, by the testimony of former inhabitants of *Marlborough Place*, who asserted that a great nuisance arose from the crowding of the road by the children in coming and going to the schools, the noise made by them in playing, their offensive habits, and frequent practice of writing indecent words on the walls. Counter evidence, on the other hand, went to shew that the above causes of complaint were in some degree to be accounted for by the want of accommodation in the *Marlborough Place* buildings, and were at all events greatly exaggerated.

As to the depreciation in the value of house property caused by the establishment in the neighbourhood of such schools as these, the Plaintiffs adduced the evidence of a number of leading architects and surveyors, which was very slightly contradicted.

Mr. *Eddis*, Q.C., and Mr. *Lindley*, for the Plaintiffs:—

The covenant in the purchase deed of *Thurlow*, the predecessor

V.-C. B. 1871 HARRISON v. GOOD.

of the Defendant *Good*, enured for the benefit of all the purchasers of the other lots sold at the sale: *Mann* v. *Stephens* (1); *Western* v. *Macdermott* (2).

The only operative word in the covenant is "nuisance." The difference between legal and equitable nuisance is illustrated by *Tipping* v. *Eckersley* (3). What a "nuisance" is, is defined by *Gale* on Easements (4); by *Blackstone* (5), in the following terms: "Nuisance, *nocumentum*, or annoyance, signifies anything that works hurt, inconvenience, or damage;" and by *Russell* on Crimes (6) in the same terms. The annoyance which will be occasioned by a national school is abundantly shewn by the evidence.

The brick-burning cases have given rise to various definitions of nuisance, especially by Vice-Chancellor *Knight Bruce*, in a well-known passage in *Walter* v. *Selfe* (7); *Bamford* v. *Turnley* (8) and *Cavey* v. *Leadbitter* (9) also illustrate this.

As to the particular matters here complained of, in *Doe* v. *Keeling* (10) Lord *Ellenborough* says (11): "A business of this kind (that of a schoolmaster) would necessarily produce inconvenience in the neighbourhood, both by the disturbance which the inmates of the house would create, and by drawing to the spot a large resort of persons, such as the parents and friends of the children."

In *Kemp* v. *Sober* (12) the covenant was, "not to carry on any trade, business, or calling . . . to the annoyance, nuisance, or injury" of any of the houses of *Kemp Town* estate, *Brighton;* and it was held that the carrying on a girls' school was within the terms of the covenant.

In *Inchbald* v. *Robinson* (13) it was held that the noise occasioned by the music and shouting of performers in a circus was a nuisance to the occupiers of adjoining houses.

In *Gauntlett* v. *Whitworth* (14), which was a case of nuisance, an

(1) 15 Sim. 377.
(2) Law Rep. 2 Ch. 72.
(3) 2 K. & J. 264.
(4) Page 275; 4th Ed. p. 428.
(5) Vol. iii. p. 216; Broom & Hadley's Ed. p. 285.
(6) Vol. i. p. 317; 4th Ed. p. 435.
(7) 4 De G. & Sm. 315.
(8) 3 B. & S. 62.
(9) 13 C. B. (N.S.) 470.
(10) 1 M. & S. 95.
(11) Ibid. 99.
(12) 1 Sim. (N.S.) 517.
(13) Law Rep. 4 Ch. 388.
(14) 2 C. & K. 720.

architect in the witness-box was allowed by Chief Justice *Wilde* to be asked whether any depreciation of property was occasioned by the acts complained of. Here the evidence as to depreciation is substantially uncontradicted.

[They also cited *Soltau* v. *De Held* (1).]

Mr. *Kay*, Q.C., and Mr. *Marten*, for the Defendants:—

We are not bound to the Plaintiffs by this covenant; only to the vendor. In *Mann* v. *Stephens* (2) the suit was brought by a successor in title of the vendor himself. In this case there were no reciprocal covenants: *Child* v. *Douglas* (3). The contention necessarily implies that the vendor has never released *Thurlow;* but that does not appear to be the fact. If a vendor sells a portion of a plot of land, retaining the rest, and covenants with the purchaser not to build on the portion retained, that covenant will bind a purchaser of the retained portion, though the covenant does not run with the land. But if a vendor sells in lots, taking a covenant from each purchaser, and not engaging not to release, and there are no reciprocal covenants, the purchaser of one lot has no remedy against the purchaser of another; for this reason, that the vendor (unless he has covenanted to the contrary) may release any purchaser he pleases. On this ground *Western* v. *Macdermott* (4) may be distinguished.

Upon the language of the covenant, the word "nuisance" must be confined to its strict legal acceptation. In *Doe* v. *Keeling* (5) the question simply was: Is the keeping a school a business? In *Kemp* v. *Sober* (6) there were the additional words "annoyance or injury," which do not occur here.

Bacon, Abr. "Nuisance" (A) (7), defines a number of nuisances, but does not mention the keeping of a school. In *Rex* v. *Moore* (8) it was said that if a person collected together a crowd of people to the annoyance of his neighbours, that was a nuisance; but that was for profit, being the case of keeping grounds for pigeon-shooting. In *Inchbald* v. *Robinson* (9), the circus case, it was not the

(1) 2 Sim. (N.S.) 133.
(2) 15 Sim. 377.
(3) Kay, 560; 2 Jur. (N.S.) 950; on appeal, 5 D. M. & G. 739.
(4) Law Rep. 2 Ch. 72.
(5) 1 M. & S. 95.
(6) 1 Sim. (N.S.) 517.
(7) 7th Ed. vol. v. p. 788.
(8) 3 B. & Ad. 184, 188.
(9) Law Rep. 4 Ch. 383.

V.-C. B. 1871 HARRISON v. GOOD.

assembling together of the crowd which was held to be the nuisance, but the shouting and noise within the building.

The only authority about a school being a nuisance which is to be found, is in *Comyn*, Dig. "Action upon the Case for a Nuisance" (C) (1), where the only instances given in which a school may be a nuisance, are, firstly, the setting up of a school "so near my study, who am of the profession of the law, that the noise interrupts my studies;" and, secondly, "if a schoolmaster set up a school near to the school of another." Even in the former of these cases, it is the noise inside, not the crowd, noise, and habits of the children outside, which constitute the nuisance.

In *Soltau* v. *De Held* (2) it was the ringing of the bells, not the building of the church, which was complained of, and restrained. There is no case in which the mere assemblage of persons to an entertainment, without noise, has been held to be a nuisance. In *Rex* v. *Moore* (3) there was, besides the acts of trespass and of injury to property, the noise in discharging the fowling-pieces. In *Walker* v. *Brewster* (4) there were, in addition to the crowd, the performance of a powerful brass band, fireworks, &c.

A school is a lawful undertaking; and a national school is not conducted for profit. Day pupils cannot assemble without using the public streets. The streets are under the supervision of the police, and the schools are regulated by teachers and managers. There is no reason why the assemblage and dispersion of the children should not be managed so as to be free from noise and offensive acts.

The covenant is, that no nuisance shall be committed "on" the strip of land. But it is not said, nor can it be said, that what is done on the land by school-keeping causes the nuisance; the complaint is about something which is done off the land in coming and going.

Evidence of depreciation in value may be resorted to, but only to measure the amount of a nuisance when proved; the fact of the nuisance must be first established independently; the circumstance of depreciation is not sufficient alone to establish a nuisance.

The better construction of the covenant is, that by the words "adjoining property" was meant, not the adjoining lots, but the

(1) 5th Ed. vol. i. p. 420.
(2) 2 Sim. (N.S.) 133.
(3) 3 B. & Ad. 188.
(4) Law Rep. 5 Eq. 25.

property adjoining the whole piece of ground originally sold to *Chandless*, and which was then being sold in lots.

Mr. *Eddis*, in reply:—

On the question of the right of the Plaintiffs to sue on the covenant, *Western* v. *Macdermott* (1) is really conclusive. The true result of the decision in *Child* v. *Douglas* (2) has been explained in *Keates* v. *Lyon* (3). The vendor is, in cases of this kind, a trustee of the covenant for all the purchasers.

On the other point, "nuisance" must be held to mean whatever may render a man's occupation of his residence "substantially uncomfortable:" *Walter* v. *Selfe* (4); *Hole* v. *Barlow* (5).

Although the acts complained of are not done on the land, if they are the necessary and inevitable result of what is done on the land, they will be restrained, as in the pigeon-shooting and circus cases.

SIR JAMES BACON, V.C.:—

Upon the first point I have no doubt whatever that the Plaintiff *John Dangerfield* is entitled to the full benefit of the covenant, and entitled to it against the Defendant, the owner of the land, and the other Defendants associated with him. The history of the case appears to be this—that Mr. *Eyre* sold his land to Mr. *Chandless*, and took a restrictive covenant from him; Mr. *Chandless*, at a subsequent time, sold the land which he had bought, and sold it under those particulars and conditions of sale which are stated in the bill. The 5th condition, which has been referred to, which I need not read again, is in substance and nearly in words the same as the covenant which was afterwards introduced into the conveyance.

Now, I have looked at the conveyance. The conveyance itself is entirely in accordance with the statements in the bill and the facts which are proved in the case. The conveyance, as I very well recollect (I have it not at hand, and it is unnecessary that I should refer to it particularly, unless I make a mistake in stating the substance of it), contains, first, a recital of the purchase from

(1) Law Rep. 2 Ch. 72.
(2) Kay, 560; 2 Jur. (N.S.) 950; S. C., on appeal, 5 D. M. & G. 739.
(3) Law Rep. 4 Ch. 218, 228.
(4) 4 De G. & Sm. 315.
(5) 4 C. B. (N.S.) 334.

V.-C. B. 1871 HARRISON v. GOOD.

Mr. *Eyre* by Mr. *Chandless*, and of the conveyance by Mr. *Eyre* to Mr. *Chandless*. It is said in one passage in the answer, that when the abstract was delivered there was no notice contained in it of the restrictive covenant. I pass by that, as being wholly unimportant. If the conveyance was stated upon the abstract, of course it was the duty, which could not be avoided, of the purchaser's solicitor to look at the conveyance, which was there shortly recited. I can have no doubt, therefore, if that were an important point, which I do not think it is, that the Defendant *Good* is clearly fixed with distinct notice of the covenant entered into by Mr. *Chandless* with Mr. *Eyre*. Besides that, the deed goes on to recite the sale by auction in thirty-four lots, and it refers to a plan, which is in the margin of the first skin of parchment upon which the conveyance is written, which describes the whole of the thirty-four lots. What is meant, therefore, by the "adjoining property" in the covenant is, in my opinion, open to no kind of doubt or question; and the covenant itself, being considered only according to the true construction of the deed, not importing into it any other circumstances which one may believe to have existed, is to be read as if, an auction being held, and thirty-four lots being submitted to public competition, the purchaser, Mr. *Thurlow*, bought three of those lots, and bought them upon the terms mentioned in the conditions of sale, which terms were afterwards embodied in the conveyance. The covenant which he entered into, which has been so often referred to, is, that he, *Thurlow*, his heirs or assigns, "will not do or suffer to be done upon the premises anything which shall be, or be deemed to be, a nuisance to *Henry Samuel Eyre*, or any of the tenants or the occupiers for the time being of the adjoining property, or the houses to be built thereon." In my opinion, there is no doubt whatever that, as a matter of construction, "the adjoining property" there mentioned is that property adjoining the three lots purchased by Mr. *Thurlow*, which are described in the plan drawn in the margin of the conveyance. Of the title of the Plaintiff to sue, therefore, upon the covenant, in my opinion no question can be raised.

There remains only to be considered whether that which the Plaintiff complains of is an infraction of the covenant. Now the covenant is in very limited terms, no doubt. Probably the con-

veyancer thought that he had very sufficiently prevented the possibility of any erection being made upon the land, or of doing anything by means of any erection upon the land, which could be even distasteful to the owners of the adjoining property. If that was his meaning, he has not expressed it, and it is not competent to me to enlarge the meaning of the words which he has employed, and which form the contract between the parties.

The word "nuisance" is a word perfectly well known to the law. It means only one thing. In common parlance, "nuisance," no doubt, is applied to a great many things wholly different from, and others not at all like, the definition which by law is given to the word "nuisance." But if it does not mean only that signification which the law has put upon it, I am at a loss to know what it does mean; because, if I enlarge it in some degree, I must enlarge it perhaps in a greater degree, and if I were to substitute the popular word "annoyance" for the legal term "nuisance," I do not know how I could stop, if any person entitled to the benefit of the covenant should allege to me that the thing which was being done was disagreeable or distasteful to him. It might be carried so far. It would be, I think, reducing the covenant to an absurdity if I were to extend it so as to include mere matters of personal antipathy. That which would be odious and almost intolerable to one man, others might not care a straw about. I say, therefore, that I am confined entirely to the meaning of the word "nuisance," as I find it used in and applied by the law.

Now, the cases which have been referred to strictly limit it to that. The case of the brick-burning was this: A man who burns bricks to the nuisance of his neighbours is liable to be restrained by this Court, and is liable to an action on the case brought against him in a Court of Common Law. This case does not approach that authority at all. Then it is said that this will be disagreeable to the Plaintiff. No doubt it will. It is said also that it will depreciate his property. I think there is abundant evidence in support of that fact; but that is not enough.

The common law case of *Doe* v. *Keeling* (1), which was referred to, established nothing to shew that the thing itself was a nuisance. But it was pointed out to the jury who had to assess the damages,

(1) 1 M. & S. 95.

V.-C. B. 1871 HARRISON v. GOOD.

that they were not to consider what was done a mere trifle—not a mere infraction of a covenant which would bring with it no substantial injury—but that the carrying on the trade of a school in a place where a man has contracted to carry on no trade at all, might be not merely a breach of covenant, but a great inconvenience to the persons interested, and might be doing the very thing the covenant was intended to prevent.

The case of *Kemp* v. *Sober* (1) is open, in my opinion, to the same observation; because we all know that, although the Court of Chancery interferes, when it thinks it right, by way of injunction to prevent the violation of a covenant, yet, if the violation is so slight, formal, and unsubstantial that the Plaintiff can have no ground in conscience to complain of it, the Court will not grant an injunction. It is for this reason that the observation was made by the Vice-Chancellor, in *Kemp* v. *Sober*, as to the word "annoyance." The word "annoyance" occurred in the covenant in that case, and an annoyance might be experienced by the adjoining neighbours from the fact of there being a school in which music and dancing were taught.

Now, can I say that this is a nuisance? The building of a house is no nuisance. The establishment of a school is no nuisance in itself. As to the fact that a number of boys will be collected (I do not know that they are collected to go to school, but when they come out, unquestionably there will be collected a number of boys coming out of school at the end of school hours), being the Queen's subjects, and walking along the Queen's highway, I do not see by what kind of reasoning it can be said that that will be a nuisance. I do not forget it is said there was a school in *Marlborough Place*, which is proved to have been what is called a "nuisance;" and that deserves to be examined, because the evidence states that it was inconvenient and injurious to one of the witnesses, that he lost a good tenant, and for four years he could not get another; and then he was obliged to sell the house at a reduced price. The inconvenience there spoken of is, that the boys, on coming out of school, misbehaved themselves. That is not a necessary consequence of their being in school or of their coming out of school. The common police regulations of the metropolis

(1) 1 Sim. (N.S.) 517.

prevent the possibility of any such nuisance being committed, if the police think fit to put the law in force. If boys commit the indecencies which are spoken of, they can at once be punished and restrained. I have no reason to believe that in such a thoroughfare as *Abbey Place* is described to be, the same sort of inconvenience will exist as existed in *Marlborough Place*, which is described as a smaller and shorter street. But I do not enter into that. Nor am I much impressed by the statement that rules have been made, because I observe from the date that the rules were made after the bill was filed; and although I give the Defendants credit, to which they clearly are entitled, for not meaning to permit anything which would be indecent or improper, or even inconvenient to anybody, yet I cannot attach very much importance to that. I have no means of enforcing the rules, nor any confident notion that the rules will be observed.

Throughout the whole of this case I have been endeavouring to find out where the legal nuisance is. If it is not a legal nuisance, I have nothing to do with it. Unless the nuisance complained of is one for which an indictment will lie, or an action can be maintained, in my opinion it is no nuisance within the terms of this covenant.

I would not have it supposed that I am not perfectly sensible of the great disadvantage which will happen to the Plaintiff, Mr. *Dangerfield*, if this school should be established in the place where it is proposed. I have no doubt that the value of his property will be depreciated. But the case which was referred to, and very properly referred to, is by no means an authority for the proposition that, because a depreciation in value would take place, the owners of adjoining property suffering depreciation have therefore a right to call that a "nuisance" which they fail to prove otherwise to be a nuisance. The law upon that subject I take to be clear and plain. I am obliged, therefore, to come to the conclusion that no legal nuisance will be committed; and I will go a little further and say, I do not believe that there could by possibility happen anything which can be properly called a "nuisance," although it may be an inconvenience or a disadvantage. A loss to Mr. *Dangerfield* unquestionably there would be; all the hopes that he formed when he spent £6000 in building his house will be disappointed; his residence will be made much less agree-

V.-C. B. 1871 HARRISON v. GOOD.

able than it was. But I cannot enlarge the terms of this covenant in order to give him a right which has not been stipulated for in the covenant, a matter which the Defendants are entitled to the benefit of as much as he is, and which was introduced for their common benefit.

I am obliged, therefore, to dismiss his bill; but I cannot order him to pay the costs of it, and for a very plain reason. It has been proved to my satisfaction that, upon the church site, there is a space upon which the gentlemen who are the Defendants in this suit might, if they had chosen, have built, and may still, if they should choose, build a convenient and suitable school. The evidence shews that there did exist some doubt upon the subject in the first place, in consequence of a barrister's opinion (which doubt was removed by a subsequent opinion), that the schools may well be established there. There was a difficulty about obtaining access to the schools; that difficulty has also been removed, as appears by Mr. *Harrison's* evidence; and the site may be easily and conveniently procured. I think that if Mr. *Dangerfield's* offer then made—I say nothing about his offer since made, because I have no power to enforce that offer upon these gentlemen—had been accepted, and the remonstrance which was made by him had been attended to, it is probable there would have been no litigation.

The reason why I do not give the costs is, first, I am satisfied that there is, and the Defendants know there is, a suitable site which might be had gratis for the establishment of these schools. That appears not only from the evidence which has been adduced, but there is also a plan—I do not know whether I am strictly right in referring to it—drawn by Mr. *Good* himself, which shews not only the site of the schools, but the access and entrance for the scholars through the mews. Without, however, looking at this plan, considering what is elsewhere proved, I am satisfied, without imputing motives to these gentlemen, that if they had been actuated by the ordinary feelings which one may ascribe to neighbours living in a district like this, they might have accomplished that most useful object which they have in view, without doing any injury to Mr. *Dangerfield*. The tone of the letters from Mr. *Good* to Mr. *Dangerfield* satisfies me that I ought not to

make the Plaintiff pay the costs of this suit. Mr. *Good* says: "If you and your friends, who are interested in removing the site of the proposed school building, will come prepared at the next committee to substitute a portion of the mews adjoining the ground surrounding the church, with access to the same from the mews, I will support you, and will at the same time undertake to assure you that the vacant ground in *Abbey Place* shall be let for private residences, and for no other purposes. If you cannot provide any other site I hope you will not obstruct the general business of the committee, as we have several matters requiring immediate attention." Mr. *Dangerfield* did his best to comply with that; he procured the assent of the trustees of the school site; he procured the consent of Mr. *Harrison*, who was the owner of land in the mews. All that seems to have been in vain. On the 27th of January Mr. *Good* writes to him again: "A meeting of the *St. Mark's School Building Committee* will be held here to-morrow evening, and as you have only recently been elected one of its members, I may as well intimate to you at once that it is expected every member belonging to it will, in one way or another, assist in contributing to the fund, as every member has already done so most liberally, excepting yourself. I am anxious to inquire whether you will be prepared to announce at this meeting your willingness and intention to contribute." Mr. *Good* had perhaps a right to write such a letter as that. At the same time it strikes me that it is an attempt, knowing the disadvantage under which Mr. *Dangerfield* laboured, to make him contribute not to the extent that he thought right, but to the extent that would satisfy Mr. *Good*, or perhaps some other person. I think that was unfair and unneighbourly conduct. I think that by reason of that correspondence, and probably in consequence of that only, this suit was instituted. I think, if Mr. *Dangerfield's* offer had been more readily accepted—if his remonstrances had been more fairly and patiently attended to—there would have been no litigation.

Although, therefore, I can give him no relief upon this record, I dismiss his bill without costs.

Solicitors for the Plaintiffs: Messrs. *Dangerfield & Fraser.*
Solicitors for the Defendants: Messrs. *Dod & Longstaffe.*

V.-C. B.
1871
Jan. 21.

In re CRÉDIT FONCIER OF ENGLAND.

Company—Reduction of Capital and Shares—30 & 31 Vict. c. 131—General Order of the 21st of March, 1868—Form of Order.

A Petition having been presented by a company for confirmation of resolutions for reduction of its capital and shares, an order was made for an inquiry as to debts, and the presentation of the Petition was directed to be advertised, and a list of creditors to be left at the Judge's Chambers. This having been done, the Chief Clerk certified that a list of creditors had been settled, but that the names of some of the creditors, who were holders of the company's debentures, being unknown to the company, did not appear on the list. None of them had claimed under the 13th section of the *Companies Act*, 1867, to be entered on the list. Upon the Petition coming on to be heard, and being unopposed:—

Held, that the debenture holders were in the position of creditors who were now excluded, under the 13th section, from the right of objecting to the proposed reduction.

Other creditors named in the list, whose debts were not yet due, and were secured, had neither assented to, nor dissented from the proposed reduction:

Held, that they were not to be considered creditors "who do not assent," within the 14th section of the Act, but must be taken to have assented.

Fourteen days from the date of the order fixed for discontinuance of the words "and Reduced."

Form of order as to final advertisements, and otherwise.

THIS was a Petition presented by *The Crédit Foncier of England, Limited and Reduced*, a company registered under the Act of 1862, praying for confirmation of a resolution passed on the 28th of February, 1870, and confirmed on the 15th of March following, for reducing the capital and shares of the company; that a proper date might be fixed for the discontinuance of the addition to the company's name of the words "and Reduced;" and that for these purposes all proper directions might be given, inquiries made, notices given, and proceedings taken.

The company was originally constituted in 1866, with a capital of £2,000,000, in 200,000 shares of £10 each, all of which had been fully paid up. On the 4th of February, 1870, a resolution was passed modifying the articles of association, under the powers of the 9th section of the *Companies Act*, 1867 (30 & 31 Vict. c. 131), which, being confirmed on the 28th of February following, became a special resolution; and was followed by the resolution

above-mentioned, for reduction of the capital and shares of the company to a sum of £1,000,000 in 200,000 shares of £5 each.

On the 29th of March, 1870, in conformity with the General Order of the 21st of March, 1868, an order was made upon application of the Petitioners by summons, for an inquiry as to the debts, claims, and liabilities of or affecting the company on the 3rd of May, 1870, and directing notices of the presentation of the Petition to be advertised in the *London Gazette,* and three times in the *Times, Daily News,* and *Standard,* and a list of persons who should be creditors on the date aforesaid, with office copy of the affidavit verifying the same, to be left at the Judge's Chambers.

The Chief Clerk, by his certificate, dated the 19th of December, and approved the 23rd, found that the above directions had been complied with, and that a list of persons who were creditors on the 3rd of May, 1870, had been settled, together with the names of such creditors, "except such of the said creditors to whom debts are due on the debentures mentioned in the said schedule which are payable to the bearers thereof, whose names are not known to the company," and that such debts or claims amounted altogether to the sum of £351,473 6*s.* 8*d.* Amongst the former was a debt or claim of £36,580 7*s.* 2*d.* in respect of money lent, and not yet repayable, and interest, due to the *National Bank of Scotland;* a debt or claim of £15,303 5*s.* 8*d.* in respect of another sum of money lent, and not yet repayable, with interest, due to *Giles Loder;* a debt or claim of £5444 3*s.* 9*d.* owing to or claimed by *John Lindsay Scott* in respect of a contingent guarantee for the payment by the *Millwall Dock Company* of their debentures to the amount of £5000, with interest; and a debt of £397 5*s.* 4*d.* to the Commissioners of Income Tax.

The amounts of these debts or claims were all admitted by the company.

The certificate also found that certain creditors named, to the amount in value of £25,497 19*s.* 6*d.*, had, since the 3rd of May, 1870, been fully paid, and that certain sums had been paid on account of three other debts, namely, £303 5*s.* 8*d.* on account of the above-mentioned debt to *Giles Loder;* £161 5*s.* 8*d.* on account of the debt to the Commissioners of Income Tax; and £2000 on account of a debt of £14,000 for three and a half years

V.-C. B. 1871 *In re* Crédit Foncier of England.

rent to the *City Offices Company;* also that the company were willing to set apart and appropriate the amount of the residue of the debt due to the Commissioners of Income Tax.

Further, that a debt to, or claim by, the *Imperial Land Company of Marseilles, Limited*, and its liquidators, to the amount of £1,075,232, or such sum as might be recovered in a suit then pending by the *Marseilles Company,* was not admitted by the company, and they were not willing to set apart and appropriate the amount of such debt or claim. Such debt or claim had not been fixed by inquiry and adjudication in the manner provided for by the 14th section of the Act.

Also that creditors to the amount of £173,707 4*s.* 7*d.* had consented; and that the *Marseilles Company's* debt or claim had been disallowed.

From the affidavit of the accountant of the company it appeared that other payments had been made beyond what appeared in the certificate, and which were not inserted in the certificate owing to the vouchers not having been produced to the Chief Clerk; and the result was, that the ascertained creditors apparently unpaid, and who had not consented to the proposed reduction, were the *National Bank of Scotland*, who were secured creditors for £36,580 7*s.* 2*d.*, and *Giles Loder*, who was also secured for £15,000. Of the debentures for £160,000, some had been paid off, but it was admitted that £120,000 worth of such debentures, payable to bearer, remained unpaid.

The Petition now came on to be heard, unopposed; but there came on for hearing at the same time a summons which had been taken out by the *Marseilles Company* to obtain the opinion of the Judge on their above-mentioned claim.

Sir *Roundell Palmer*, Q.C., Mr. *Fry*, Q.C., and Mr. *Jackson*, for the Petitioners:—

Under the 13th section of the *Companies Act*, 1867, creditors who are entitled to object to a proposed reduction of capital and shares are creditors who, at the date fixed by the Court, are entitled to any debt or claim which, if that date were the commencement of the winding-up, would be admissible in proof against the company. With regard to that class of creditors,

consent is necessary; but payment, or determination of the debt, or the giving security for its amount, will render consent unnecessary.

Then the 13th section requires that the Court shall settle a list of creditors, and may publish notices fixing a time within which creditors are to claim to be entered, or to be excluded from a right of objecting. That was inserted probably in order to provide for two classes of persons, creditors who might be overlooked by the company, and creditors of whom, from the nature of the claim, the company could not be cognisant.

As to the amount to be appropriated by way of security, when the debt of a non-assenting creditor is not discharged or determined, the 14th section provides, first, that if the full amount of the debt be admitted, or though not admitted, be such as the company are willing to set apart or appropriate, then the full amount of the debt or claim is to be appropriated; and secondly, if the amount be not admitted, and such as the company are unwilling to set apart or appropriate, the amount may be inquired into and adjudicated by the Court.

Then the 17th section saves the rights of creditors who may be in ignorance of the proceedings.

The 9th rule of the General Order of the 21st of March, 1868, provides that the company shall send to each creditor entered in the list (provided for by the 13th section of the Act and the 4th rule of the Order) a notice stating the amount of the proposed reduction and the time within which, if he claims to be a creditor for a larger amount, he must send in particulars of his claim. The 14th rule of the Order prescribes the classes of debts and claims which are to be stated in the certificate; and the 15th rule provides that, after eight days from the filing of the certificate, the Petition may be placed in the list of Petitions. Notices of the day of hearing are (rule 16) to be published, and the 17th rule gives creditors the option, upon giving two clear days' notice to the solicitor of the company, to appear and oppose the application.

In the present case there is no creditor who appears and opposes. With the liquidators of the *Marseilles Company* an arrangement has been made, and they consent, on the terms that the disallowance by the Chief Clerk of their claim for the purpose of this

V.-C. B. 1871

In re CRÉDIT FONCIER OF ENGLAND.

Petition shall be without prejudice to any right which they may establish, and that they may have the costs of their present appearance.

As to the debenture holders whose names are not known, we submit that they are creditors not entered on the list, who may, on receiving the notice by advertisement under the 16th rule of the Order, come forward and claim under the 13th section of the Act to be entered on the list, and if they fail to do so, are to be excluded from the right of objecting.

As to the creditors whose names are on the present list, the provisions of the Act of Parliament have been fully complied with by the Petitioners. But the *National Bank of Scotland* and Mr. *Loder*, whose debts have not matured, and are secured, and Mr. *Scott*, who has given a contingent guarantee for a sum of money not presently payable, though they do not dissent, have given no written consent; and the question is, whether the Court cannot, nevertheless, treat them as assenting.

If not, the result will be, that creditors who actively neither consent nor dissent, and who take no step whatever, are in a better position than those who actively dissent, inasmuch as the former will have a right to have the full amount of their debts or claims appropriated, whilst the latter must (rule 19 of the Order) submit to the "directions" of the Court, the Court being consequently bound to exercise a discretion.

As to the discontinuance of the words "and Reduced," considering that the name of the company has had this addition since February, 1870, we ask that a fortnight may be fixed for its discontinuance; as in *In re Telegraph Construction Company* (1), and *In re Muntz's Metal Company*, before Vice-Chancellor *Malins*, July 8, 1870.

As to the final advertisements required by rule 20 of the General Order, the practice has been to direct them to be made in the same newspapers as the preliminary notices were advertised in.

Mr. *Higgins*, for the liquidators of the *Imperial Land Company of Marseilles*.

(1) Law Rep. 10 Eq 389.

SIR JAMES BACON, V.C.:—

The only difficulty that seems to exist, if it be a difficulty, is upon the words in the 14th section, "where a creditor does not consent."

It appears to me, taking the Act of Parliament, and looking at all its provisions together, that a creditor who "does not consent" does not mean a creditor who remains perfectly passive, having the opportunity of opposing.

As to the list of creditors in the present case, in the first place there have been mentioned debenture holders whom it is impossible to ascertain, but who, by means of the advertisement published under the Act of Parliament, have been, as it is supposed, sufficiently apprised of the proceedings which are taking place concerning their rights. I think that the absence of these debenture holders cannot be any reason why the order should not be made.

With regard to the debt to the Government, it is proposed to provide for that. As to the debts to the *Bank of Scotland* and to Mr. *Loder*, which are stated to be fully secured, although the creditors do not in writing assent, or by their appearance assent, there is no opposition on their part. They have both been partly paid. Then Mr. *Scott's* is a guarantee debt, payable at a future date. I do not think that the absence of these several creditors forms any reason why the order based on the Chief Clerk's certificate, formal and right as it is in all other respects, should be suspended. Therefore, with great safety, I think I may make the order desired, and that it is a correct order.

As to the time of a fortnight, which was the time fixed by Vice-Chancellor *Malins* in a case in which the words "and Reduced" had been used for a much shorter period than that for which they have been used here, I cannot do wrong in following that as a precedent. Then as to the advertisements in the newspapers, they will be as suggested, in the *London Gazette*, and in three *London* newspapers.

Sir *Roundell Palmer* referred to the 20th rule of the Order, and asked the Court to fix in what manner and at what times the advertisements were to be inserted.

The VICE-CHANCELLOR ordered the advertisements to be inserted twice in the same three newspapers that were selected for the preliminary advertisements; once in each of two successive weeks.

V.-C. B.

1871

In re CRÉDIT FONCIER OF ENGLAND.

The following was the order:—

Upon the application of *Henry Chatteris*, *Frederick Maynard*, and *Alexander Samuelson*, the liquidators of the *Imperial Land Company of Marseilles, Limited*, that, notwithstanding the lapse of more than four days since the signing of the Chief Clerk's certificate, dated the 17th of December, 1870, the said applicants might be at liberty to obtain the opinion of the Judge upon the claim made by them as such liquidators against the *Crédit Foncier of England, Limited and Reduced*, and that the Judge might adjudicate thereon, or else that the said certificate might be varied by allowing instead of disallowing said claim, and upon hearing the solicitors for the applicants and for the *Crédit Foncier* . . . . in Chambers, the same was adjourned to be heard in Court, and coming on this day to be heard accordingly, together with the Petition of the *Crédit Foncier* . . . . on the 25th of March, 1870, preferred . . . . and upon hearing counsel for the said liquidator and for said Petitioners, and upon reading the said Petition, the two affidavits of *Alexander Samuelson* filed . . . . the Chief Clerk's certificate, dated . . . . an affidavit of . . . . the *London Gazette*, dated the 13th of January, 1871, and the following newspapers: the *Times*, of the 11th and 19th of January, 1871, the *Daily News*, of the 11th and 17th of January, 1871, and the *Standard*, of the 11th and 17th of January, 1871, each containing an advertisement of the day appointed for the hearing of the said Petition; and it appearing by the Chief Clerk's said certificate that all the creditors of the said *Crédit Foncier* . . . . consent to the said Petition, other than the Commissioners of Income Tax, and the *National Bank of Scotland*, *Giles Loder*, and *John Lindsay Scott*, and the debenture holders set forth in the first part of the first schedule to the Chief Clerk's said certificate;

This Court doth order that the said *Crédit Foncier* . . . . do, before the 10th day of February, 1871, pay into the bank to the credit of *The Crédit Foncier of England, Limited and Reduced, The Account of Income Tax*, £235 19*s.* 8*d.*, found due to the Commissioners of Income Tax. . . .

And this Court being of opinion that none of the said debts of the said *National Bank of Scotland*, *Giles Loder*, and *John Lindsay Scott*, or of the debenture holders, require to be provided for in the manner required by the 14th section of the *Companies Act*, 1867;

This Court doth order that, upon such payment into the bank, the special resolution passed . . . . and confirmed . . . . and which resolution was in the words following . . . . (reciting it) be confirmed:

And it is ordered that this order, together with the original receipt from the *Bank of England*, for such payment as aforesaid, be produced to the Registrars of Joint Stock Companies, and that an office copy of this order be delivered to them, together with a minute in the words or to the effect set forth in the schedule hereto:

And it is ordered that notice of the registration, by the Registrar, of this order, and of the said minute, be published once in the *London Gazette* and once in the said *Times*, *Daily News*, and *Standard* newspapers (in) the two weeks next following such registration:

And it is ordered that the said Petitioners . . . . be at liberty to discontinue the addition to their name of the words "and Reduced" after the expiration of fourteen days from the date of this order:

And it is ordered that the disallowance of the claim of the said liquidators of the *Imperial Land Company* . . . . by the Chief Clerk's said certificate, is to be with-

out prejudice to the right, if any, which the said *Imperial Land Company* may establish against the said *Crédit Foncier* .... in certain litigation now pending, or otherwise:

And it is ordered that the said *Crédit Foncier* .... do pay to *H. Chatteris*, *F. Maynard*, and *A. Samuelson*, the said liquidators, their costs of and relating to the said application and of the said Petition .... to be taxed .... if the parties differ:

And it is ordered that the Petitioners be at liberty to apply in Chambers for the payment out of the said sum of £235 19*s.* 8*d.*, when they shall have paid to the Commissioners of Income Tax the amount due to them.

THE SCHEDULE.

MINUTE APPROVED BY THE COURT.—The capital of the *Crédit Foncier of England, Limited and Reduced*, is £1,000,000, divided into 200,000 shares of £5 each.

Solicitors for the Petitioners: Messrs. *Uptons, Johnson, & Co.*

Solicitors for the Liquidators of the *Imperial Land Company of Marseilles*: Messrs. *G. S. & H. Brandon.*

BARNABY *v.* TASSELL.

Will—Class of Children of "Brothers and Sisters" held to include Children of Brothers and Sisters dead at the date of the Will—Words "Et cetera"—Practice—Special Case—New Defendant—Amendment.

Testator bequeathed "all my furniture, &c.," together with six freehold houses, to his wife for life, and after her decease, as follows: "One half to my brothers and sisters for their life and then to come to their children and in the same manner to my wife brother and brothers children and grandchildren."

At the date of the will testator had one brother and three sisters living, another brother and another sister having died, both leaving children. At the same date there was one wife's brother living, two wife's brothers having died, one without issue living, the other leaving children and grandchildren. At the date of the testator's death his wife and all his brothers and sisters were dead, but his wife's brother was still living:—

Held, that one moiety of the property was divisible among all the children living, at the testator's death, of all his brothers and sisters who left children, *per stirpes;* that the wife's surviving brother took an estate for life in the other moiety, and that after his death it was divisible amongst all the children and grandchildren living at his death, or coming into existence during the lifetime of the tenant for life, of himself and the other wife's brothers who left children or grandchildren; the

V.-C. B.
1870-71
BARNABY
v.
TASSELL.

families taking *per stirpes*, and the children and grandchildren of each family *per capita*.

Testator was possessed, at his death, of some waterworks company shares :— *Held*, that the shares did not pass under the expression "&c."

Special case, amended by leave at the hearing, by adding a party in existence before the case was filed, but accidentally omitted, and ordered to be set down, as amended, against the added Defendant.

SPECIAL CASE.

John Barnaby, by his will, which was holograph, and much misspelt, dated the 8th of April, 1862, after directing the whole of his debts, funeral, and testamentary expenses to be paid by his executors thereinafter named, gave and bequeathed "all my furniture, &c., with my six freehold houses" (describing them) to his wife for life; and he gave and bequeathed after the decease of his wife as follows: "One half of the freehold houses and property to my brothers and sisters for their life and then to come to their children [and grandchildren] and in the same manner to my wife brother and brothers children and grandchildren." He then appointed three executors, one of whom was a son of the Mrs. *Sutton* below mentioned; the others were a son and grandson of *Thomas Blackman* below mentioned.

The testator died on the 27th of October, 1869.

The will was proved; but the words "and grandchildren" in brackets above, being an interlineation, were not admitted to probate.

The freeholds described in the will were of gavelkind tenure.

The testator was, at the time of his death, possessed of twenty shares in the *Chatham Waterworks Company*.

The testator had had two brothers, *Robert* (the elder of the two) and *William;* and four sisters, *Elinor*, *Susannah Batty*, *Mary Wildish*, and *Elizabeth Margaret Sutton*.

At the date of the will, *Robert Barnaby* and Mrs. *Sutton* were dead; and the only nephews and nieces of the testator living were two children of Mrs. *Batty*, two children of *Robert*, and four children of Mrs. *Sutton*.

At the date of the death all the brothers and sisters were dead, but there were children, or a child and grandchildren, or a grandchild living, of *Robert Barnaby*, Mrs. *Batty*, Mrs. *Wildish*, and Mrs. *Sutton*.

The testator's wife, whose maiden name was *Blackman*, and who died after the will, but before the testator's death, had brothers only, three in number, namely, *Richard*, *Russell Thomas*, and *Thomas*.

Richard and *Thomas Blackman* were dead at the date of the will. *Richard* had only one child, who also died before the date of the will. Both *Thomas* and *Russell Thomas Blackman* had children and grandchildren living at the date of the will, and at the testator's death, and some had been born since.

Russell Thomas Blackman was still living.

The material questions for the purposes of this report were:

1. Whether by the words "the freehold houses and property" the whole of the property of the testator, or only such property as is thereinbefore described or referred to, or some and what part thereof, is meant; and, if the latter, what is comprised in the term "*et cetera*" used in the said will?

2. What estates and interests were given by the said will to the testator's said brothers and sisters in the said freehold houses and property, and whether any, and (if any) what, estates and interests in the same were by the said will given to the children of the testator's said brothers and sisters, and to the brothers of the testator's wife and their children and grandchildren respectively, or any of such persons or classes? and in particular,

5. How the costs of the case are to be provided for?

It was admitted in the argument that by the word "wife" the testator meant "wife's."

Mr. *Grosvenor Woods*, for the Plaintiffs, the two children of *Robert Barnaby*:—

As to the personalty, there is an intestacy.

The expression "*et cetera*" will pass only property *ejusdem generis*; hence not the waterworks shares: *Newman* v. *Newman* (1). The words "the property" refer only to the personalty before bequeathed: *Doe* v. *Earles* (2).

As to the realty, if the Court should find the devise void for uncertainty, or that the real estate has lapsed, the Plaintiffs will take as co-heirs of the testator. If not, the Plaintiffs claim not to

(1) 26 Beav. 220. (2) 15 M. & W. 450.

V.-C. B. 1870-71. BARNABY v. TASSELL.

be excluded, although they are children of *Robert*, the brother who was dead at the date of the will.

As a general rule, where there is a gift to children of a class, children of those members of the class who are dead at the date of the will are to be excluded. But this rule, no less than others, will yield to clearly manifested intention. Thus, in *In re Jordan's Trusts* (1), where a testator, after giving legacies to his brother and three sisters (who were living at the date of the will) by name, directed his trustees to stand possessed of a fund, after the death of his wife, in trust to pay the same unto and amongst all and every or such one or more of his "brothers" and sisters who should be living at the death of his wife, and the child or children of such of his said "brothers" and sisters as should have died in the lifetime of his wife—the Lord Chancellor (then Vice-Chancellor *Wood*), relying on the repeated use by the testator of the word "brothers," although he had only one then living, allowed the children of two brothers, who were dead at the date of the will, to participate.

Again, in *Gowling* v. *Thompson*, before the Lords Justices on 8th June, 1868, where a testator, having two sisters but no brother living at the date of the will, gave his residuary real and personal estate to all and every his "brothers and sisters or their issue" in equal shares as tenants in common, "and to their respective heirs, executors, administrators, and assigns," the Lord Chancellor (then Lord Justice *Wood*) and Lord Justice *Selwyn*, affirming the decision of Vice-Chancellor *Stuart*, gave a sixth of the fund to each sister, and the remaining four-sixths to the issue of three brothers and a sister who had died before the date of the will; the issue taking amongst themselves *per capita* (2).

(1) 2 N. R. 57; 8 L. T. (N. S.) 307.

(2) In *Gowling* v. *Thompson* their Lordships delivered the following judgments:—

SIR W. PAGE WOOD, L.J.:—

The singularity of this case is, that this testator speaks of his brothers and sisters, when in fact all his brothers have been dead several years. It must be assumed that he knew they were dead, and some meaning must be given to the words which he has used introducing his brothers. The general principle laid down in *Christopherson* v. *Naylor* (1 Mer. 320), that where a testator refers to a class he cannot be held to have intended to include dead persons in it, is displaced in this instance by the fact that the testator must have known that his own brothers were all dead. It is idle to talk of substitution

Applying these authorities to the present case, the children of the testator's deceased brother and sister who were dead at the date of the will are included.

As to the costs, it is submitted they ought to be paid rateably out of the shares.

Mr. *Eddis*, Q.C., for Defendants, children of Mrs. *Sutton*, and children and grandchildren of *Thomas Blackman*:—

The children of the testator's brother and sister, and the children and grandchildren of the wife's brother, who were dead at the date of the will, participate. The apparently opposing decision in *In re Thompson's Trusts* (1), which was commented upon in *Hannam* v. *Sims* (2), has been explained and reconciled by the Lord Chancellor in *In re Jordan's Trusts* (3). As to the second moiety, there is no ground for holding that *Russell Thomas Blackman* takes a moiety in the whole. Under a gift to *A.* and the children of *B.*, *A.* and the children of *B.* take in equal shares *per capita*: *Hawkins* on Wills (4), referring to *Butler* v. *Stratton* (5). If so, *R. T. Black-*

---

when the persons for whom it is contended some one else was to be substituted have never formed one of the original class at all. But when a testator speaks of his brothers and sisters at a time when he must be taken to have known that all his brothers and one of his sisters were dead, the only rational inference is, that he named the brothers and sisters for the purpose of shewing how the property was to be divided. He must have intended the property to go to his brothers and sisters, if living; but if they were dead, then to the issue, who were substituted for them, and to go to these issue *per stirpes*. It also appears to me that there is nothing to limit the construction of the word "issue," so as to mean only children; and the result will be that the fund is to go to all the issue in whatever degree living at the testator's death; but as amongst the issue of each *stirps*, the words "their respective heirs, executors, administrators, and assigns," remove all question as to their taking as joint tenants.

The residue must, therefore, be divided into six parts, each of the surviving sisters will take one of those sixths, and the issue of each of the deceased brothers and sisters who left issue will take a sixth, divisible *per capita* as amongst themselves, whatever their degree of kindred.

The costs of all parties must come out of the estate.

SIR C. J. SELWYN, L.J., concurred, and said that the brothers and sisters, whether living or dead, were mentioned as being respectively the *stirps* from which the issue was to spring.

(1) 5 D. M. & G. 280.
(2) 2 De G. & J. 151.
(3) 2 N. R. 57; 8 L. T. (N.S.) 307.
(4) Page 113.
(5) 3 Bro. C. C. 367.

V.-C. B. 1870-71

BARNABY v. TASSELL.

man and the children of *Thomas* take in equal shares as joint tenants *per capita*.

Mr. *E. Leigh Pemberton*, for a grandchild of Mrs. *Wildish*.

The VICE-CHANCELLOR said that, as the words "and grandchildren" had not been admitted to probate, he could not hear any argument on behalf of a grandchild of a brother or sister of the testator.

Mr. *V. Hawkins*, for Defendants, a child of Mrs. *Batty*, and children and grandchildren of *Russell Thomas Blackman*:—

If the will be read according to the "ordinary sense and meaning of the words:" *Leach* v. *Leach* (1); *Habergham* v. *Ridehalgh* (2)—in the devise of the first moiety, only brothers and sisters living at the date of the will could have been referred to, and the children and grandchildren of the predeceased brother and sister must be excluded. Where original gifts fail, gifts by substitution must fail likewise.

As to the other moiety, the right of *R. T. Blackman* to a life estate in the whole is not disputed; all that is contended for, is, that the children and grandchildren of the wife's deceased brother must be excluded.

The word "brothers" is in the possessive singular, and refers to the brother before mentioned, namely, *R. T. Blackman*.

As to the personalty, the words "and all other things" have been held to carry the residue: *In the Goods of Ann Cadge* (3).

Mr. *Wickens*, for the Defendant *Russell Thomas Blackman*:—

That *R. T. Blackman* takes a life interest in the second moiety is clear.

The only question is, whether the words "to come to" *R. T. Blackman's* children do not constitute an estate tail in *R. T. Blackman*.

Mr. *Woods*, in reply:—

It is unlikely that the testator intended to benefit the two children of one niece (Mrs. *Batty*), and to exclude his six other

(1) 2 Y. & C. Ch. 495, 499. (2) Law Rep. 9 Eq. 395, 400.
(3) Law Rep. 1 P. & D. 543.

nephews and nieces then living, one of whom he appointed to be one of his executors. The two other executors also belong to the class which it is sought to exclude.

The word "brothers" is more likely to be in the possessive plural. If not, the testator would probably have used the pronoun "his" instead of "brothers;" corresponding to "their" in the preceding clause of the will.

[In reply to a question by the Court, an affidavit was read shewing that the testator was at the date of his will aware that his brother *Robert*, his sister Mrs. *Sutton*, and his wife's brothers, *Richard* and *Thomas Blackman*, were then dead, and leave was given, with consent of all parties, to amend the case by stating this fact.]

SIR JAMES BACON, V.C.:—

Upon the first point, that the expression "&c." refers only to property *ejusdem generis*, and does not carry the waterworks shares, and that the word "property" in the subsequent claim refers only to the property already bequeathed, I have no doubt whatever.

But as to the true construction of the gift of one moiety to the testator's "brothers and sisters for their life, and then to come to their children, and in the same manner to" his "wife's brother and brothers children," I have the greatest possible difficulty.

Adopting, however, *Gowling* v. *Thompson* as an authority, but still with the greatest hesitation, and the least possible confidence in the soundness of the result at which I am arriving, I must hold that the children, living at the testator's death, of all the testator's brothers and sisters who left children took one moiety *per stirpes*, and that the same construction is applicable to the other share; consequently, that the wife's surviving brother takes an estate for life, impeachable for waste, in the other moiety, and that after his death the same is divisible amongst the children and grandchildren living at the testator's death, or coming into existence during the lifetime of the tenant for life, of himself and the other brothers of the testator's wife who left children or grandchildren, and the representatives of such children and grandchildren.

I hold also that, as between the families, the moieties are

V.-C. B. 1870-71

BARNABY v. TASSELL.

divisible *per stirpes;* but that, as between the members of each family, the shares are divisible *per capita.*

A grandchild of *R. T. Blackman* had been born a few days before the special case was filed, and had been accidentally omitted.

At the hearing, the Court was asked to appoint for the infant the same special guardian who represented the other infants in the same interest, and to allow the necessary amendments in the case to be made.

Mr. *Wickens* suggested whether it would not be necessary that the case, if amended, should be again set down.

The VICE-CHANCELLOR prefaced the decree with an order that the case, amended by stating the name of the infant and the appointment of guardian, be set down against the infant Defendant.

The costs of all parties were ordered to be paid out of the estate, the personal estate being first liable.

The following are minutes of the decree so far as material:—

Appoint *Stephen Ward* special guardian to concur in the case on behalf of the last-born child of *Margaret Scrace.* The case to be amended by adding the name of that child, and stating the appointment of guardian. The case to be set down as against the new Defendant.

Declare, that by the words "the freehold houses and property" only such property passed as was thereinbefore described or referred to. That the "&c." only comprised articles *ejusdem generis.*

Declare that the children, living at the testator's death, of the testator's brothers and sisters who left children, took, in the events which have happened, one moiety of the property disposed of by the will *per stirpes.* That the Defendant *Russell Thomas Blackman* the elder takes a life interest in the other moiety. That on his death the same moiety is divisible amongst the children and grandchildren living at the testator's death, or coming into existence during the lifetime of *R. T. Blackman* the elder, of the said *R. T. Blackman* the elder, and the other brothers of the testator's wife, or the representatives of such children and grandchildren, as between the families of the testator's wife's said brothers *per stirpes,* but as between the children and grandchildren *per capita.*

Costs of all parties of the special case to be paid out of the testator's estate. The personal estate to be applied in the first instance for that purpose.

Solicitors for all Parties: Messrs. *Fearon, Clabon, & Fearon.*

BRUCE *v.* BRUCE.

M. R.
1870
Dec. 7.
1871
Jan. 17.

Power to appoint among Children by Deed—Appointment by Will—Reference to different Power—Defective Execution aided.

By articles, on the marriage of *A.*, followed by a disentailing assurance, an estate was conveyed in trust for the children of the marriage, as *A.* should by deed appoint, and in default of appointment, for such children equally. By a subsequent assurance, which was inoperative, *A.* purported to put an end to the former power and to confer upon herself a general power of appointment over the same estate. She married a second time, and died leaving three children by the first marriage and two by the second, and having made her will, whereby, without any reference to the power in the marriage articles, pursuant to the alleged general power and in exercise of every other power enabling her, she purported to appoint the said estate to her eldest son by the first marriage, charged with a sum of £3000 in favour of all the children by both marriages other than the eldest son:—

Held, that the will operated as a valid exercise of the power in the articles, and that the eldest son was entitled to the estate, subject to raising the sum of £3000 for the other two children of the first marriage.

THE object of this suit was to obtain a declaration of the Court that a power to appoint by deed, among the children of the donee of the power by her first marriage, was properly exercised in their favour by an appointment by will, not expressly referring to the power, and purporting to be made in favour of the children both by her first and second marriage.

By articles in the Scotch form, dated the 9th of January, 1837, and made on the marriage of *William Bruce* and *Ann Bruce* (then *Ann Daniel*), all the property of *Ann Bruce*, including an estate in *Wales*, called *Llangeitho*, of which she was tenant in tail, was conveyed to trustees in trust after the death of the husband and wife, as they should jointly appoint, and in default of such joint appointment, and in the event (which happened) of *Ann Bruce* being the survivor, then in trust for the child or children of the intended marriage, as the said *Ann Bruce* should by any deed direct or appoint, and in default of such appointment, in trust for the children of the said marriage equally.

There were three children of the marriage, namely, the Plaintiff, *William Henry Bruce*, and two of the Defendants, *Robert Daniel Bruce* and *Mary Bruce*.

M. R.
1870
BRUCE
v.
BRUCE.

In September, 1844, *William* and *Ann Bruce* executed a statutory release to trustees, with the view of disentailing the estate, but the deed was not inrolled.

In 1847 *William Bruce* died, without having joined with his wife in executing any joint appointment.

In June, 1851, *Ann Bruce* executed a disentailing assurance of the property comprised in the settlement. In July, 1852, she intermarried with *Richard Jones;* and by a settlement dated the 24th of July, 1852, and made in contemplation of that marriage, it was agreed that they should both execute such acts and assurances as should be necessary to vest the *Llangeitho* estates in the trustees of that settlement upon trust for *Ann Jones* (formerly *Ann Bruce*) for life, and after her death, if *Richard Jones* should survive her, for such persons as *Ann Jones* should by deed or will appoint, and in default of appointment, upon trust for *Richard Jones* for life.

By an indenture dated the 8th of March, 1854, and made between the said *Richard Jones* and *Ann Jones* of the one part, and the trustees of the settlement on the second marriage of the other part, *Richard Jones* and *Ann Jones* purported to convey the *Llangeitho* estates to the trustees, to hold the same to such uses and for such trusts and purposes as the said *Ann Jones* should by deed or will appoint, and, subject thereto, if *Richard Jones* should survive, in trust for him for life, with remainder to *Ann Jones* in fee.

There were two children of the second marriage.

Ann Jones made her will, dated the 21st of March, 1854, and thereby, after reciting that by the indenture of the 8th of March, 1854, certain lands were conveyed to such uses and upon such trusts as she should by deed or will appoint, she proceeded as follows:—

"Pursuant to and in exercise of the power to and for this purpose given by the said indenture of the 8th of March, 1854, and every other power enabling me in this behalf, I do by this my will appoint that the lands comprised in the said indenture of the 8th of March, 1854, shall, from and after my decease, remain to the use of *J. B. Wharton* and *W. H. H. Johnson*," (the trustees) "upon trust for the said *Richard Jones* during his life, and after the decease of the survivor of myself and the said *Richard Jones*, upon trust to raise

the sum of £3000, and, subject thereto, in trust for my son *W. H. Bruce*, his heirs and assigns."

And the testatrix declared that the said sum of £3000 so to be raised should be in trust for all her children by her first and second marriage, other than the said *W. H. Bruce*, the Plaintiff.

The testatrix, by a codicil to her will, revoked the trust in favour of her second husband, *Richard Jones*.

The testatrix died in 1868, and her eldest son instituted the present suit.

The bill charged that the will of the testatrix *Ann Jones* was an effectual exercise of the power of disposition given to her by her marriage articles, so far as it purported to confer any interest in the land in question upon the Plaintiff and the two other children of the first marriage, but was inoperative as regarded the children of the second marriage, and prayed a declaration that the will was a valid exercise in equity of the power reserved by the marriage articles of the 9th of January, 1837, and that the Plaintiff was entitled to the *Llangeitho* estates, subject to the raising thereout the sum of £3000 in favour of *Robert Daniel Bruce* and *Mary Bruce*.

On behalf of the two other children of the first marriage, *Robert Daniel Bruce* and *Mary Bruce*, it was alleged that the will did not operate as a valid appointment, but that the estate went, in default of appointment, among the three children of the first marriage, in conformity with the marriage articles.

Mr. *Cookson*, for the Plaintiff:—

The question in this suit is, whether the will of the testatrix *Ann Jones* was a valid exercise of the power of appointment in favour of the children of her first marriage, contained in the marriage articles of the 9th of January, 1837.

The marriage articles must be taken to have been imported into the disentailing assurance of June, 1851: *Cheney* v. *Hall* (1).

The settlement on the second marriage purported to give her a power of appointment over the income during the life of *Richard Jones*, the second husband. By the deed of the 8th of March, 1854,

(1) Amb. 526.

M. R. 1870 BRUCE v. BRUCE.

Mr. and Mrs. *Jones* purported to convey the *Llangeitho* estates to the trustees of their settlement to such uses as *Ann Jones* should appoint. This deed, which was wholly inoperative, is the one referred to in the will as containing the power which the testatrix intended to exercise.

By that will Mrs. *Jones*, having a limited power under the marriage articles to appoint by deed among the children of the first marriage, purported, in exercise of the power contained in the deed of the 8th of March, 1854, "and of every other power enabling her in that behalf," to appoint the estate to the eldest son of the first marriage charged with £3000, for the benefit of the children of both marriages other than the eldest son.

I submit that, though this is a defective exercise of the power, it is one which the Court will aid, in order to carry into effect the intention of the donee of the power. The testatrix evidently intended to exercise every power she had. She thought, though erroneously, that the power under the articles was at an end, and that she had power to appoint generally under the deed of the 8th of March, 1854.

Where there is a power to appoint among children generally, though not to one exclusively, it may be exercised by appointing an estate in block to one, with charges on it for the benefit of the others: *Thwaytes* v. *Dye* (1); *Sugden* on Powers (2). Therefore, as regards the children of the first marriage *inter se*, the power is well exercised.

Further, this exercise of the power was valid, though executed by will. It is true that a power to appoint by will cannot be exercised by deed, but when the converse case arises, then a will may be treated as a writing not under seal, and the execution as defective merely. Nor is it necessary that the appointee should have no other provision: *Tollet* v. *Tollet* (3).

In *Sneed* v. *Sneed* (4), where a father had a power to make provision for his children by deed, an appointment by will, even for children already provided for, was held good. In *Hervey* v. *Hervey* (5) it was held that, in aiding the defective execution of a

(1) 2 Vern. 80.
(2) 8th Ed. p. 408.
(3) 2 P. Wms. 489.
(4) Amb. 64.
(5) 1 Atk. 561, 567.

power, either for a wife or child, the fact of its being intended for a provision, whether voluntary or not, would entitle the Court to carry it into execution. In *Smith* v. *Baker* (1), the cases where equity will supply a defective instrument were also considered.

Here the question is not whether the children of the first marriage shall be unprovided for altogether, for they would take some share in any event, but whether the intention of the testatrix to give the eldest son a larger share, shall be carried into effect.

In *Chapman* v. *Gibson* (2), where a testator had a copyhold estate unsurrendered and no freehold, a surrender was supplied for a wife against a distant heir not provided for by the testator, though provided for *aliunde*.

The result is that the Plaintiff is well entitled to the whole estate, subject to the charge of £3000 for his brother and sister; that the power given by the articles is well exercised by the will; that the fact of the eldest son being provided for is not material; that if the object of the donee of the power is clear, it is not necessary that the power itself should be referred to; and that it is one to which the Court will give effect.

Mr. *J. H. Humphreys* (Mr. *Jessel*, Q.C., with him), for the two younger children of the first marriage:—

The will of the testatrix is not a good exercise of the power contained in the marriage articles, and if it operates as an exercise of the power at all, it is such a defective execution that this Court will not aid it.

This Court will not aid a defective execution of a power, except in cases where the donee intended to exercise that particular power, or where the aid of the Court is sought by those who are the proper objects of the power. Here, as regards the intention of the testatrix, the words, "every other power enabling me in this behalf," are not sufficient.

In *Clogstoun* v. *Walcott* (3), where a testatrix, having a testamentary power of appointment in favour of her children over certain funds standing in the names of trustees, bequeathed, and by virtue of every power enabling her in that behalf, appointed all the property she had power to dispose of to the same trustees, upon

(1) 1 Atk. 385. (2) 3 Bro. C. C. 229. (3) 13 Sim. 523.

M. R. 1870 BRUCE v. BRUCE.

trust, after payment of debts, to invest the residue for the benefit of her children, it was held that her will was not an exercise of the power.

Here the testatrix intended to exercise another power altogether, namely, that in the deed of the 8th of March, 1854—for that was the only power under which, if valid, she could have made such an appointment as that which she purported to do by this will. The result is, that the children by the first marriage take equally in default of appointment.

Mr. *Macnaghten*, for the children of the second marriage.

Mr. *Winterbotham*, for Mr. *Jones*.

Mr. *F. Waller*, for the trustees.

Mr. *Cookson*, in reply:—

Clogstoun v. *Walcott* (1) was quite different from the present case, for in that there was something on which, if the power had not been exercised, the disposition could operate; whereas here there was nothing on which the power in the marriage articles could operate if it were not exercised by the will. Further, the fact of the donee of the power including in the appointment strangers to the power will not render it invalid: *Sugden* on Powers (2).

1871 Jan. 17. LORD ROMILLY, M.R.:—

The question in this case is, whether a power to appoint, given by the settlement made on the marriage of Mrs. *Jones*, has been well executed by her.

[His Lordship then stated the facts of the case, and continued:—]

There is no doubt that a power to execute by deed, such as that given by the articles of January, 1837, may be well executed by will; but that will not dispose of this question. It is true that the testatrix uses the words "every other power enabling me in that behalf;" but it is also clear that, not only she had not the articles

(1) 13 Sim. 523. (2) 8th Ed. p. 507.

present to her mind, but that she did not believe that the power contained in the articles had any existence, or that she was able to exercise such power. She believed that the disentailing assurance of September, 1844, had completely put an end to it, and that the deed of the 8th of March, 1854, was the deed which settled the whole property.

At the hearing of this case, I was disposed at first sight to think the question turned more on a question of intention than on the question of aiding the execution of a power. I considered it to be a rule applicable to the execution of powers that a power will not be deemed to be executed contrary to the intention of the donee of the power when the donee supposes that a different power from that assumed to be executed is vested in him. But there is no doubt that this Court will, in order to give effect to the intentions of the donee of the power for that purpose, aid the execution of a power not specially referred to, though such power was not present to the mind of the donee at the time of the execution.

In this case there is plain evidence that the testatrix did not intend the will to be an execution of the power contained in the marriage articles; but the intention of the donee was that, by all the means in her power, the dispositions contained in her will should be carried into execution referring to every power she had. It is, I think, therefore necessary to see whether the intention which she displayed by her will would be best effected by making the will take effect as an execution of the power contained in the marriage articles, or by giving it a contrary effect. By the will it is plain that she meant to give the greater part of the *Llangeitho* estate to her eldest son, taking out of it £3000 only, which she intended to divide amongst her four other children. Two of them are not objects of the power; and therefore, as to £1500, the object of the testatrix would be defeated. But if the power in the articles be not executed, the children of the second marriage would be equally deprived, and the only result would be, that the three children of the first marriage would take the whole equally. I think, therefore, that I should be more seriously interfering with the objects and wishes of the testatrix by holding that this will did not operate as an execution of the power contained in the marriage articles than by the opposite conclusion.

M. R. 1871 BRUCE v. BRUCE.

It is clearly settled that an execution by will is a good execution of a power executed by deed in such cases as the present. I think, therefore, that the Plaintiff is right, and is entitled to the decree that he asks. If the testatrix had any other property, a question of election might arise, but no such case was opened before me. I think, therefore, that I must make the decree as asked. Costs out of the estate.

Solicitors: Messrs. *Burton, Yeates, & Hart.*

M. R. 1871 *Jan.* 28; *Feb.* 8.

CALLANANE *v.* CAMPBELL.

Will—Succession Duty—16 & 17 *Vict. c.* 51, *s.* 5—*Bequest upon Trust—Annuity—Foreign Domicil.*

A foreigner domiciled abroad bequeathed his residuary estate to four trustees (three of whom were resident in *England*), upon trusts for conversion and sale, and investment of the proceeds in consols, and upon trust to pay out of the income of the consols two annuities; and he directed the trustees to set apart a sufficient fund of consols to answer the annuities, and after the determination of either annuity the fund so appropriated was to revert to and form part of his residuary estate; and, subject as aforesaid, he directed his residuary estate to be held upon trust for his children. The testator made his will and died in *London*, but had no estate within the *United Kingdom*, except the personal effects in his possession at the time of his death:—

Held, that, upon the death of one of the annuitants, no succession duty was payable in respect of the fund appropriated to answer the annuity.

Reversed L.R. 5 H.L. 524.

THIS was a suit for the administration of the estate of *William Callanane*, of *Oporto*, who, by his will dated the 1st of September, 1853, after making specific bequests, gave all the rest and residue of his estate to four trustees, upon trusts for sale and conversion, and investment of the proceeds in the "3 per Cent. Consolidated Bank Annuities of *Great Britain*," and upon trust, out of the dividends and income of the Bank Annuities for the time being constituting his residuary estate, to pay two annuities of £200 and £50 respectively to his wife and sister; and he authorized and directed his trustees to appropriate, set apart, and retain in their names such an amount of 3 per Cent. Consolidated Bank Annuities out of his residuary estate as they should from time to time think

expedient for the payment of the said annuities, such appropriations, when made, to exonerate the rest of his personal estate therefrom; and he directed that as and when the annuities, for or in respect of which the said appropriations should be made, should cease or determine, the amount so appropriated in respect of such an annuity should revert to and become part of his residuary estate; and, subject as aforesaid, he willed and directed that the whole of his residuary estate should be in trust for his son *William* and his daughters *Angelina* and *Christina*, to be equally divided between them.

The testator died in September, 1853, and the present suit was instituted in 1863; and by orders made in the suit two sums of consols had been carried over to answer the annuities given to the wife and sister of the testator.

The sister of the testator died in October, 1870, and a Petition was now presented for a division of the fund set apart to answer her annuity.

The question was raised on this Petition, whether succession duty was payable on this fund.

It appeared that the testator was a native of *Ireland*, but had acquired a domicil in *Portugal*, where he had resided from an early period in his life until shortly before his death. In 1853 he came to *England* for surgical advice and assistance, but died shortly after his arrival there in lodgings in *London*, where he made his will. His children were domiciled and resident in *Portugal*. His sister, the annuitant, was domiciled and resided in *Ireland*. Three of the trustees named in the will were resident in *London;* the fourth was resident in *Portugal*. The testator had not at the time of his death any property within the *United Kingdom*, except the personal effects then in his possession. No legacy or succession duty was claimed at the time of his death in respect of his residuary estate; but it was now alleged that succession duty was payable in respect of the fund which became divisible by the death of the testator's sister.

Mr. *Faber*, and Mr. *Martineau*, for the residuary legatees:—

It is clear, and will not be denied, that no legacy or succession duty was payable on so much of the residue as became divisible on

M. R. 1871 CALLANANE v. CAMPBELL.

the death of the testator: *Thomson* v. *Advocate-General* (1); *Wallace* v. *Attorney-General* (2). The annuity given to the testator's sister was merely a charge thrown on the legatees' interest. Why should any succession duty be payable on the cessation of that charge? It is a fallacy to suppose that the residuary legatees became entitled to the fund at the death of the annuitant. They came into the enjoyment of it at that time, but they became entitled to it at the death of the testator. Under these circumstances, there is no "succession" within the meaning of the *Succession Duty Act.*

Two authorities will probably be cited in support of the claim, *In re Smith's Trusts* (3), which was decided before *Wallace* v. *Attorney-General,* the leading case on this subject, and *In re Badart's Trusts* (4), which latter case we say does not apply; for the Vice-Chancellor *Malins* expressly decided that case "without in the slightest degree supposing that the property of any merchant resident abroad, who happens accidentally to be present in *England,* and makes his will, is liable to succession duty" (5).

Mr. *Bovill,* for the trustees.

Mr. *W. W. Karslake,* for the Crown:—

I admit that the testator was domiciled abroad at the time of his death, and I lay no stress on the facts that he made his will in *England,* and died there. I contend that, under sect. 5 of the *Succession Duty Act,* the residuary legatees are "successors" by reason of a benefit having accrued to them on the death of an annuitant after the period fixed for the commencement of the Act.

The testator directs his estate to be invested in consols, and to be administered by four trustees, of whom three were resident in *London.*

Now when a person domiciled abroad directs a fund to be remitted to this country, and invested in the funds of this country upon trusts to be carried out in this country, and within the

(1) 12 Cl. & F. 1.
(2) Law Rep. 1 Ch. 1.
(3) 12 W. R. 933.
(4) Law Rep. 10 Eq. 288.
(5) Law Rep. 10 Eq. 298.

jurisdiction of the Courts of this country, then the increase of benefit to the *cestuis que trust* arising from the death of a person who has an interest in the trust fund is a "succession" within the meaning of the Act: *In re Lovelace's Settlement* (1); *In re Wallop's Trusts* (2). The latter of these cases arose under a will, and not under a settlement, as was supposed by Lord *Cranworth* in *Wallace* v. *Attorney-General* (3). The doctrine I contend for was acted on in the cases of *In re Smith's Trusts* (4): *In re Capdeveille* (5); *In re Badart's Trusts* (6). There can be no distinction between the case of a tenant for life and that of an annuitant.

The case of *Thomson* v. *Advocate-General* (7), in which it was held that legacies given by the will of a domiciled foreigner were not subject to legacy duty, was decided shortly before the passing of the *Succession Duty Act;* and if it had been intended to exempt cases such as the present from the operation of the Act, a suitable provision would have been inserted in sect. 18 of the Act. It is clear that that section, as it stands, does not exempt the residuary legatees: *Attorney-General* v. *FitzJohn* (8).

Feb. 8. LORD ROMILLY, M.R., after stating the facts, continued:—

In *Wallace* v. *Attorney-General* (9) it was determined by Lord *Cranworth*, after much consideration, that in such a state of circumstances the personal estate of a testator who was a foreigner domiciled abroad did not pay succession duty. It had long been settled that it did not pay legacy duty, but the enactments relating to legacy and succession duty are different. Still, *Wallace* v. *Attorney-General* established that, according to the words of the statute relating to succession duty, such an estate did not pay succession duty. Accordingly that decision was followed in this case, and no duty was levied or claimed on the residue of the estate of the testator here. I think that disposes of this case, for I am clear that the fund now in question is part of the residue,

(1) 4 De G. & J. 340.
(2) 1 D. J. & S. 656.
(3) Law Rep. 1 Ch. 9.
(4) 12 W. R. 933.
(5) 2 H. & C. 985.
(6) Law Rep. 10 Eq. 288.
(7) 12 Cl. & F. 1.
(8) 2 H. & N. 465.
(9) Law Rep. 1 Ch. 1.

M. R. 1871 CALLANANE v. CAMPBELL.

and is indistinguishable from it, and in fact it can hardly be said to have been separated from it; certainly not as a distinct fund by the will, for the testator only directs that the £50 per annum, part of the income of his residue, shall be paid annually to his sister during her life; and though the income of so much of the residue has been thus appropriated, still it remains as much part of the residue as the part which has been otherwise appropriated. It may be that there is some difficulty in reconciling the whole of the decisions, but I consider *Wallace* v. *Attorney-General* (1) to be a binding authority on this subject. It has always been followed, so far as I know, and it seems to me to rest on very lucid and unanswerable reasoning, and to apply expressly to the present case, and to govern it.

Solicitors: Mr. *George Annesley;* Messrs. *Walker & Martineau;* Mr. *Browning; The Solicitor of Inland Revenue.*

M. R. 1870 *July* 4; *Nov.* 9. 1871 *Feb.* 25.

MACLAREN *v.* STAINTON.

Administration—Tenant for Life and Remainderman—Claims against Testator's Estate—Compromise—Apportionment between Capital and Income.

A claim made against the estate of a testator, founded on an alleged breach of trust, was compromised by the payment of a large sum several years after the testator's death:—

Held, that for the purpose of dealing between the tenants for life and remaindermen under the trusts of the will, the sum paid was to be treated as composed of a principal debt due on the day on which the transaction took place out of which the claim originated, of interest at £5 per cent. from that day up to the date of the testator's death, and of interest at £4 per cent. on the aggregate of the said principal and interest from the testator's death to the time of payment; and that the principal and interest up to the testator's death were chargeable against *corpus*, and the subsequent interest against income.

THIS suit was for the administration of the estate of *Henry Stainton*, who, by his will, devised and bequeathed his residuary real and personal estate upon trust for sale and conversion; and directed the proceeds to be divided into eight parts, two of which were to be allotted to each of his two sons, one to each of his three daughters then living, and one to the children of a deceased

(1) Law Rep. 1 Ch. 1.

daughter; and the respective shares of his sons and daughters were to be held upon trust for them during their respective lives, and after their deaths for their children.

The testator died on the 5th of December, 1851. He had for a long period acted as agent to the *Carron Company*, and after his decease that company, and the representatives of various shareholders therein, instituted legal proceedings for the purpose of giving effect to certain claims made by them on the estate of the testator in respect of certain shares, the property of the company, alleged to have been improperly retained by the testator for his own use. After the litigation had gone on for some time, and an investigation had been made, on behalf of the person entitled to the estate, as to the amount likely to be recovered therefrom, agreements were entered into upon the footing of the result of such investigation for the compromise of these claims; and in pursuance thereof large sums were, with the sanction of the Court, and several years after the death of the testator, paid to the claimants in satisfaction of their claims; and in particular, two sums of £220,000 and £104,654 16*s.* were paid to the *Carron Company;* a sum of £60,000 was, on the 5th of January, 1864, paid to Sir *John James Walsham;* and on the 9th of December, 1864, a sum of £3100 was paid to *William Hamilton.* The last two sums were paid in respect of claims arising out of transactions which took place on the 5th of January, 1818, and the 9th of December, 1848, respectively.

In the course of certain inquiries which had been directed by an order made in this suit, the question arose how the payment of these sums was to be borne by the testator's estate, as between the *corpus* and income thereof; and a summons was taken out by the Plaintiffs, the executors of the testator, for the purpose of obtaining the opinion of the Court on the point. The summons was adjourned into Court, and the proceedings at the hearing are reported (1). No order, however, was drawn up on that occasion.

The Chief Clerk made his certificate, dated the 21st of April, 1870, and thereby found the proportions of the sums paid by way of compromise of the claims which were to be borne by the *corpus* and income of the estate respectively. The persons entitled to the *corpus* contended that the proportion found by the certificate

(1) Law Rep. 4 Eq. 448.

M. R. 1870 MACLAREN v. STAINTON.

as payable out of *corpus* was too large, for two reasons: first, that interest on the principal due from the testator had been calculated at £4 instead of £5 per cent.; and, secondly, that interest on the principal sum due from the testator, from the date of the testator's death to the dates of the compromises respectively, had alone been charged against income; whereas, as they contended, interest at £4 per cent. on the amount of principal and interest due at the testator's death ought to have been so charged, in addition to the interest at £5 per cent. subsequent to the testator's death.

A summons was taken out for the purpose of varying the certificate in these respects.

Mr. *Southgate*, Q.C., and Mr. *Waller*, for some of the persons entitled to the *corpus*:—

First, as to the rate of interest: These sums were recovered from the estate in respect of claims which were in the nature of claims by *cestuis que trust* against a trustee who had appropriated the trust money to his own use and employed it in his own business. If the claimants had prosecuted their demands, they would clearly have recovered interest at £5 per cent.: *Lewin* on Trusts (1); and that being so, in computing what is to be paid by the tenant for life, interest ought to be charged at £5 per cent.

Secondly: It was decided on the former occasion (2) that the parties are to be placed as nearly as may be in the same position as if their claims had been paid off at the testator's death. Suppose, now, that the principal debt was £30,000, carrying interest at £5 per cent., that £50,000 was due for interest at the testator's death, and that the compromise was not made until ten years after the death. If the debt had been paid at the testator's death, the *corpus* of the estate would have been reduced at once by £80,000; but instead of that, this amount remained part of the estate for ten years, and produced income, which was paid to the tenant for life; consequently, now that matters are being put right as between tenant for life and remainderman, the former ought to be charged with interest at £4 per cent. on £80,000, being the amount of income which he has received in excess of what he ought to have received. Besides this, the tenant for life ought to have kept

(1) 5th Ed. p. 277. (2) Law Rep. 4 Eq. 448.

down the interest accruing during the ten years on £30,000. He did not do so, and consequently he ought now to be charged with interest at £5 per cent., instead of £4 per cent., on £30,000, part of the £80,000.

Sir *R. Baggallay*, Q.C., Mr. *Haynes*, and Mr. *Appach*, for other persons in the same interest.

Mr. *F. A. Lewin* (Mr. *Jessel*, Q.C., with him), for the persons entitled to the income of the estate:—

As to the first point: It appears from the evidence that in the calculations on which the compromise was founded, the rate of interest was taken as £4 per cent., consequently we submit that that rate ought to be used for the purpose of ascertaining what is to be paid by the tenants for life. Further, this is a question partly between tenant for life and remainderman; and it is the rule of the Court in all such cases to charge interest at £4 per cent. only: *Turner* v. *Newport* (1); *Cox* v. *Cox* (2).

Then as to the second point: It is to be borne in mind that there never has been any ascertained debt on which interest could be calculated. The claims brought forward were made up of items many of which could not have been vouched, and in arranging the terms of compromise regard was had to this fact. The advantage gained by the compromise is in the nature of an annuity for years which has fallen into the *corpus*, and ought to be shared between tenant for life and remainderman in the proportions in which the debt ought to have been borne by them. It is clear that the *corpus* of the estate ought not to gain anything by the postponement of payment of the debt; yet, on the principles contended for on the other side, that must happen: the longer the payment of the debt is postponed, the less, on these principles, falls to be borne by the *corpus*.

Mr. *Kenyon*, Q.C., and Mr. *Maclaren*, for the trustees of the will.

LORD ROMILLY, M.R.:—

I am of opinion that the calculations upon which the compromise was founded have nothing to do with the case. Persons may enter into a compromise upon the basis of paying interest at

(1) 2 Ph. 14. (2) Law Rep. 8 Eq. 343

M. R. 1870 MACLAREN v. STAINTON.

£4 per cent., or £3 per cent., or no interest at all; but that cannot affect the rights of persons who are not parties to the compromise, namely, the tenant for life and the persons in remainder, between whom this question arises. If their rights were to be affected, they ought to have been called in to know what they had to say about the compromise, and to know whether they consented to be bound by any determination between the executor and the persons outside the estate who were claiming a debt against the estate. It would be monstrous to say that the executors could, by a compromise with a debtor, affect the rights of the tenant for life or persons in remainder.

The question then arises how this case ought to be considered. In the first place I will consider it as if everything had been arranged at the death of the testator; and I will take the case of a debt of £100,000, and assume that there was £30,000 due for principal and £70,000 for interest at the death of the testator. Assuming that the *Carron Company* insisted upon being paid £70,000, but would allow the £30,000 to remain due, it is quite clear the capital would have been reduced at once by the amount of £70,000, and the result would have been that the estate would have been so much the less, and the persons who were tenants for life would have got £4 per cent. on that amount, less than they would otherwise have got. The £30,000 was to remain unpaid. This was a debt due from a trustee who had got money of his *cestuis que trust*, and had traded with it; and therefore he was not only bound to pay the principal, but was bound also to pay interest at £5 per cent. Therefore, at the death of the testator there were two sums due, £30,000 for principal and £70,000 for interest, £30,000 carrying interest at £5 per cent. The £70,000 being paid off, the estate of the testator was reduced by that amount, and thereby the income of the tenant for life was reduced by the amount I have mentioned. But the principal carried interest at £5 per cent., and in that way the income of the tenant for life is reduced by the £5 per cent. on the principal, because the interest upon the debt must be kept down. If the whole had been paid off, it would have been for the advantage of the tenant for life, and he would only have had so much less income; but the matter goes on, say for ten years, and at the end of ten years

the compromise is entered into. I laid down in the case, when it came before me in 1867, that the principle upon which you must treat the case is this: You gain a profit by the compromise; I hold that that profit ought to be apportioned between the amount due for principal and interest payable out of the estate at the time of the testator's death, and the amount of interest subsequently accrued, that amount of interest being at the rate of £5 per cent. Assuming that the profit was a sum of £24,000, and that the amounts due at the testator's death, and the interest subsequently accrued, were in the proportion of nineteen to five, the result would be that you would have to apply £19,000 in reduction of the amount by which the testator's estate would have been reduced by payment of the principal and interest at the date of his death; and the amount by which the income of the estate would be diminished between the death of the testator, and the time when the debt was paid, would have excepted from it that portion of the £24,000 which was the profit of the transaction attributable to interest accrued during that period, namely, £5000; so that, supposing the total amount by which the income would have been reduced had been £15,000, there would have been deducted out of the actual income some £10,000 only. That, in my opinion, is the principle, and that is in accordance with the view I took on the former occasion. The parties do not appear to me to have adopted that view at all.

I repeat that the principle on which the compromise was entered into cannot affect the rights as between the tenant for life and remainderman; and when Mr. *Lewin* reads me the calculations and the letters upon which the compromise was based, shewing that the *Carron Company* entered into it on the principle that they were to take £4 per cent. instead of £5, I must disregard that altogether. The principle on which the compromise was entered into cannot affect the principle upon which this question is to be decided between the tenant for life and those in remainder. There were certain claims against the estate, and those were compromised. If, in the compromise, the claimants gave up the interest, you cannot put so much in the hands of the tenant for life and take it away from the tenant in remainder. The compromise does not, in the slightest degree, affect the question.

M. R. 1870 MACLAREN v. STAINTON.

The cases of *Turner* v. *Newport* (1) and *Cox* v. *Cox* (2), cited by Mr. *Lewin*, appear to me strongly corroborative of the view I take; that is to say, you are to calculate the amount as if it had accrued at the death of the testator. That is the principle upon which the matter is to be determined, and the view I take of the case.

Nov. 9. Considerable difficulty was found in drawing up the order, and the matter was this day put in the paper to be spoken to on the minutes. His Lordship directed the order to be drawn up in accordance with minutes proposed by the parties taking out the summons; and the other parties, if dissatisfied, might move to vary them.

The order was accordingly drawn up as follows:—

His Lordship being of opinion that the interest due from the testator's estate to the several creditors mentioned in the summons dated the 5th of May, 1870, was to be calculated at the rate of £5 per cent. per annum, doth declare, that for the purpose of ascertaining the profit made by the several compromises of the several claims made by the *Carron Company* against the estate of the testator, interest on the amount of the several principal debts due from the testator's estate to the said company, from the respective days on which the said several debts accrued due down to the respective days of payment, is to be calculated at the rate of £5 per cent. per annum, and that the difference between the said several sums of principal and interest so calculated as aforesaid, and the several amounts actually paid to the said company, is to be treated as profit, and apportioned rateably in respect of the said several principal debts, and interest thereon up to the 5th of December, 1851, and the interest which accrued subsequent thereto. And his Lordship doth also declare, that the tenants for life under the will of the testator are to be charged with interest at £4 per cent. per annum on the gross amount of such principal debts and interest, calculated up to the 5th of December, 1851, at £5 per cent. per annum as aforesaid, after deducting therefrom the rateable proportion of profit on the footing aforesaid. And

(1) 2 Ph. 14. (2) Law Rep. 8 Eq. 343.

his Lordship, for the purpose of dealing, as between the tenants for life and remaindermen under the trusts of the testator's will, with the several sums of £60,000 and £3100, paid to Sir *John James Walsham* and *William Hamilton* respectively, out of the testator's estate, doth order that, on the footing that each of such several sums is composed of a principal debt due on the 5th of January, 1818, and the 9th of December, 1848, respectively, and of interest to be calculated on such several principal debts respectively at the rate of £5 per cent. per annum from the said several last-mentioned days up to the 5th day of December, 1851, and of interest on the respective aggregate amounts of the said several principal debts and interest as last aforesaid, to be calculated from the 5th of December, 1851, down to the 5th of January, 1864, and the 9th day of December, 1864, respectively, at the rate of £4 per cent. per annum, the several amounts of such several principal debts and interest as aforesaid to the 5th of December, 1851, and of the subsequent interest thereon respectively as aforesaid, be ascertained. And his Lordship doth declare that the said several principal debts, and interest thereon respectively, down to the 5th of December, 1851, as aforesaid, are to be chargeable against the *corpus* of the testator's estate, and the subsequent interest on the said respective aggregate amounts as aforesaid is to be chargeable against the said tenants for life. And his Lordship doth order that this cause be referred back to Chambers to review the Chief Clerk's said certificate, dated the 21st of April, 1870, having regard to the declarations and directions hereinbefore contained; and it is ordered, that the costs of the Plaintiffs and Defendants of this application be costs in the cause.

M. R. 1870 MACLAREN v. STAINTON.

Feb. 25. No motion to vary the minutes was made, but a Petition was presented to obtain the sanction of the Court to a compromise of the matters in difference between the parties to the suit, and came on to be heard this day. It was stated that the effect of the order, as drawn up, would be to add a sum of about £60,000 to the amount found by the Chief Clerk's certificate to be chargeable against the tenants for life; and that the effect of the

1871

M. R. 1871 MACLAREN v. STAINTON.

compromise would be to add about £30,000 only to such amount. All parties, *sui juris*, were willing to assent to the proposed arrangement.

The MASTER OF THE ROLLS sanctioned the compromise on behalf of infant remaindermen.

Solicitors: Messrs. *Dawson, Bryan, & Dawson;* Messrs. *Lewin & Co.*

PETER *v.* NICOLLS.

V.-C. S.
1871
March 15.

Vendor and Purchaser—Voluntary Settlement—Title—Possession—Legal Estate —Willingness to complete Purchase—Specific Performance.

On bill by a vendor for specific performance, the Defendant, the purchaser, set up a voluntary settlement as an objection to the title, but said he was willing to complete the purchase on having a good title. He had been let into possession as purchaser, and paid part of his purchase-money, and had paid off a mortgage and got a conveyance of the legal estate and possession of the title-deeds :—

Held, that, notwithstanding the voluntary settlement, the Plaintiff was entitled to a decree for completing the purchase.

Semble, the principle of *Smith* v. *Garland* (1) does not apply to a Defendant who says he is willing to complete on having a good title.

CAUSE.

Arthur Peter, the Plaintiff, who, in October, 1854, went to and had ever since remained in *South Australia*, in May, 1848, entered into an agreement in writing to sell his estate, situate in *Cornwall*, to *Jonathan Nicolls*, the Defendant, for £3800, subject to a mortgage for £1800, which was to be taken as part of the purchase-money. The Plaintiff agreed that he would, within one calendar month, make and deliver to the Defendant an abstract of his title. The Defendant, on the 29th of September, 1848, entered into and had ever since retained undisturbed possession of the estate. On the same 29th of September he paid off the mortgage-money and obtained a transfer of the mortgage, and also possession of the title-deeds.

On the 7th of February, 1868, the Plaintiff filed his bill praying for the specific performance of the agreement, or that it might be rescinded; and for an account.

The Defendant, in his answer, filed in April, 1868, stated that the Plaintiff, in September, 1843, conveyed the estate, subject to the mortgage, to a trustee upon trusts for the benefit of himself for life and for that of his wife and children. He also stated that he made payments under the agreement, and rendered an account between himself and the Plaintiff (which was signed by both

(1) 2 Mer. 123.

V.-C. S. 1871 PETER v. NICOLLS.

parties) up to September, 1854; that he had, since that year, made, in pursuance of the verbal request of the Plaintiff, several other payments and advances of money to or on account of the Plaintiff's wife and children, which, he submitted, ought to be set off against what was due from him to the Plaintiff under the agreement; that he had erected a new dwelling-house and other buildings upon the estate, and had improved the premises by drainage and other like works. The Defendant said he did not refuse to perform the agreement; on the contrary, he had always been ready and willing to do so specifically; but he insisted that the Plaintiff must first make out his title to and convey the estate to him free from incumbrances. He also insisted that the agreement ought not to be rescinded, but, on the contrary, that it ought to be specifically performed by the Plaintiff, and that he ought forthwith to deliver an abstract of his title, and to procure a conveyance of the estate to him by all necessary parties. He submitted, on the execution and delivery of such conveyance, to pay to the Plaintiff what (if anything) was due to him under the agreement, and to have an account taken by the Court; and also to the judgment of the Court, whether, having regard to the settlement, the agreement could be decreed to be specifically performed at the instance of the Plaintiff; whether the persons interested in the settlement were not necessary parties to the suit, and whether provision ought not to be made for them out of the balance (if any) of the purchase-money remaining to be paid. The indenture of settlement was dated the 28th of September, 1843, and was executed by the Plaintiff.

The bill of the Plaintiff was amended on the 28th of July, 1868, and re-amended on the 1st of February, 1868, but not by adding parties to the suit. The Plaintiff alleged that he had no recollection of having ever executed any such settlement; and that, if such settlement was ever executed, it was voluntary, and void as against a purchaser for valuable consideration.

The Defendant, in his answer to the amended bill filed on the 30th of October, 1868, submitted to the judgment of the Court whether the settlement was voluntary or void as against a purchaser for valuable consideration; claimed to be beneficially entitled to the mortgage; stated that he had in his possession certain title-

deeds relating to the property; insisted that the Plaintiff was bound to make out his title and deliver an abstract; and stated that he was willing to produce the deeds in his possession to the Plaintiff, for the purpose of enabling him to prepare such abstract, if he could not do so otherwise. He was ready and willing to set off against the amount due to him as mortgagee what (if anything) was due from him as purchaser; and he submitted that his two characters of mortgagee and purchaser were in no wise inconsistent with each other.

In the re-amended bill the Plaintiff stated that no abstract had been delivered to, nor, except by his answer, required by the Defendant or his solicitor, and submitted that the Defendant must be taken to have waived such delivery, and accepted the title; and prayed for a declaration to that effect.

The Defendant filed a concise statement and interrogatories; and the Plaintiff's answer, filed on the 17th of January, 1870, contained a statement that, almost immediately after he left *England*, his wife went to live, and had ever since lived, with the Defendant as his wife; that although they were well aware from his letters that he was living, they, on the 7th of December, 1862, went through the form of marriage at the Registrar's Office at *East Stonehouse*, and had ever since continued to cohabit together as husband and wife; and he submitted that no payments or advances made by the Defendant to the Plaintiff's wife, after she went to live with him as his wife, ought to be allowed out of the Plaintiff's estate.

Mr. *Karslake*, Q.C. (Mr. *Vincent* with him), for the Plaintiff, after stating the facts, was stopped by the Court.

Mr. *Dickinson*, Q.C., and Mr. *Kekewich*, for the Defendant:—

The circumstances of this case are peculiar. After the bill was filed the attention of the Plaintiff was called to the fact that he had, prior to his contract to sell the estate, executed a voluntary settlement; and notwithstanding that the bill was twice amended, the persons beneficially interested under the settlement have not been made parties; but the cause has been brought to a hearing without them, and the Plaintiff now asks that he may be allowed to defeat the settlement, and that the contract entered into by the

V.-C. S. 1871 PETER v. NICOLLS.

Defendant may be specifically performed, or that it may be rescinded. So far as the persons interested under the settlement are concerned, the deed must be, by the settlor, treated as valid and subsisting; but the Defendant, a purchaser for value, is entitled to have the contract specifically performed: *Buckle* v. *Mitchell* (1). The purchaser was Plaintiff in that case, and he was, as the Defendant is here, willing to complete his purchase; but in *Smith* v. *Garland* (2), which governs this case, the purchaser, the Defendant, was not willing to do so. It was there held that the Court will not assist a vendor in defeating a prior voluntary settlement made by himself.

Though the Defendant is willing to complete, yet he desires to have a good title, and that the Plaintiff cannot in this suit give him. Some of the parties interested under the settlement may have disposed of their interests. The Defendant, if he filed a bill, would bring all parties before the Court, and it would be able to give him a decree; but as the law is now settled, it cannot be done in this suit.

[The VICE-CHANCELLOR:—The Defendant is willing to complete; but he says there is an objection to the title, which he himself can remove.]

The Court acts upon a well-established principle in reference to a person who has executed a voluntary settlement—it will not permit him to set it aside directly or indirectly by selling the estate to a stranger. The statute 27 Eliz. c. 4, however, gives a purchaser for value a right—which is not mutual—to a decree for specific performance.

[The VICE-CHANCELLOR:—In *Pulvertoft* v. *Pulvertoft* (3) Lord *Eldon* put the case of a voluntary settlement by a father and son, and upon failure the father wished to part with the estate, and said: "I cannot agree that, if the deed had been brought into Court, it would have prevented a sale by the father if that was a voluntary settlement;" and it seems from the decision in *Smith* v. *Garland*, that a purchaser can compel specific performance, but a vendor cannot, though he may have a right to sell.]

(1) 18 Ves. 100.

(2) 2 Mer. 123.

(3) 18 Ves. 84, 93.

Under ordinary circumstances a vendor—the contract being admitted—is entitled to a decree for specific performance, and to a reference as to title; and in *Smith* v. *Garland* (1) there was a contract which entitled the vendor to a decree, subject only to a good title being shewn; but that could not be done, and the bill was dismissed. It was upon the title that the decision of the Court was given. *Pulvertoft* v. *Pulvertoft* (2) also recognises the principle, that a settlor cannot come here and ask to have his settlement annulled. In *Johnson* v. *Legard* (3) a purchaser would not avail himself of his right to set aside the settlement, and the Court would not interfere on a bill by the creditors of the vendor, though the purchaser was not an unwilling one. The right of the Plaintiff to relief in this suit cannot, however, depend upon the willingness or unwillingness of the Defendant to complete. The Plaintiff is not entitled to a decree for specific performance. Further; relief cannot be given in this suit, because all the persons interested are not here; and the Court has no power to enforce discovery.

The Court cannot give a good title, but in the presence of all the volunteers: *Townend* v. *Toker* (4); and full justice cannot be done to all parties interested, except on a bill filed by the Defendant. Though the Defendant took a transfer of the mortgage, he was in possession of the estate as purchaser; and the only question is, whether in this suit, constituted as it is, the Court will, at the instance of the settlor, pronounce a decree which will in effect vest in the Defendant all the property comprised in the settlement? The question cannot be determined in the absence of the persons interested under the settlement: *Daking* v. *Whimper* (5).

[They referred to *Seton* on Decrees (6) and *Willats* v. *Busby* (7).]

Mr. *Karslake*, in reply:—

The purchaser has acquired the legal estate in this property by the effect of the *Statute of Limitations*, for he has been in possession for twenty years, and that fact distinguishes this case from all those referred to. Further, he is ready and willing to perform his

(1) 2 Mer. 123.
(2) 18 Ves. 85.
(3) T. & R. 281.
(4) Law Rep. 1 Ch. 446.
(5) 26 Beav. 568.
(6) Vol. i. p. 610.
(7) 5 Beav. 193.

V.-C. S. 1871 PETER v. NICOLLS.

contract, and he refuses to have it rescinded. The bill was filed in 1868, and the Defendant might long ago, for he says he knew shortly after it was filed of the existence of the settlement, have filed a bill; brought all the *cestuis que trust* before the Court; and asked that the settlement might be set aside as against him; but there being no cross bill, the Plaintiff is entitled to relief upon this bill. He is willing to treat the Defendant as purchaser, and to give him credit for every sum of money properly expended for the benefit of the Plaintiff's wife before she married the Defendant; and for that of the children.

[He referred to *Fry* on Specific Performance (1) and *Kelson* v. *Kelson* (2).]

SIR JOHN STUART, V.C.:—

This bill prays relief in the alternative. First, it prays to have specific performance of the Defendant's agreement to purchase. In the alternative it prays to have the agreement for purchase rescinded. The latter alternative being positively refused by the Defendant, the only question is as to the Plaintiff's right as vendor to enforce the performance of the agreement. The objection is, that since this bill was filed it has been discovered that in the year 1843 the Plaintiff had executed a voluntary settlement, and it has been argued that, as it has been decided in *Smith* v. *Garland* (3) that a man who executes a voluntary settlement cannot maintain a bill for specific performance against a purchaser, therefore the present Plaintiff cannot compel the Defendant to complete his purchase. But the decision in *Smith* v. *Garland* applies only to the case of an unwilling purchaser. In the present case the Defendant says, by his answer, that he is a willing purchaser, and wishes to complete his purchase on having a good title shewn. As it is quite clear that he can, by completing the purchase, remove all objection to the title as regards the voluntary settlement, and no other objection appears, his defence on that ground seems of no value. But the circumstances of the case are extraordinary, and the more carefully they are examined the more unjustifiable does the Defendant's conduct seem. The contract to purchase was made in May,

(1) Page 258. (2) 9 Hare, App. lxxxvi. (3) 2 Mer. 123.

17 Jun 129

1848. In September, 1848, the Defendant entered into possession as purchaser. At the same time he paid off a mortgage, subject to which the contract for sale was made. He took a conveyance of the legal estate from the mortgagee, and also took the title-deeds, which are now in his possession. All this was done in the year 1848. He has ever since been in possession—that is, for more than twenty years—with a possession undisturbed, and without any notice of the voluntary settlement. During his possession he has made payments to the Plaintiff on account of the purchase-money. It is quite clear that he has now a good title on the mere ground of his undisturbed possession for twenty years with the legal estate and the title-deeds. By his answer, he says that he insists on an abstract of title being delivered to him by the Plaintiff. Till the bill was filed, and during the whole of his twenty years' possession, he never asked for an abstract. His demand of an abstract now is made ridiculous by his offering to lend the Plaintiff the title-deeds in order to have the abstract made and delivered. On the whole case, the conduct of the Defendant is unjustifiable. There must be a decree for the completion of the purchase. It must be prefaced by a statement that the Defendant has refused the Plaintiff's offer at the hearing to have the agreement for purchase rescinded. There must be an account of what remains due in respect of the purchase-money and interest, after giving credit for the payments already made, and a conveyance to be executed by the Plaintiff on payment of what shall be certified to be due. The Defendant must pay the Plaintiff's costs of the suit.

Solicitors: Messrs. *Blaxland & Son,* agents for Mr. *John Peter,* Junior, *Callington, Cornwall;* Messrs. *R. W. Childs & Batten,* agents for Mr. *Richard Peter, Launceston, Cornwall.*

V.-C. M.
1871
Jan. 26.

LEATHER *v.* SIMPSON.

Bill of Exchange—Forged Bill of Lading—Representation—Guarantee of Genuineness.

A bill of exchange drawn upon the Plaintiff by his correspondent abroad against bill of lading, was sent through the Defendants, who were bankers, for presentation and collection. The bank presented the bill to the Plaintiff with this memorandum: "The bank holds bill of lading and policy for 251 bales of cotton, per *William Cummings*." The Plaintiff accepted the bill without asking to see the bill of lading, and afterwards retired it before it was due, paid the money and received the bill of lading, which proved to be a forgery.

Upon bill filed against the bank to recover back the money so paid upon the bill of exchange:—

Held, that the memorandum did not amount to a guarantee by the bank that the so-called bill of lading was genuine; and that the Plaintiff had no equity to recover back the money.

THE Plaintiffs, Messrs. *Leather & Marriott*, were cotton brokers at *Liverpool*, and the Plaintiff, *J. N. Beach*, was a merchant at *Liverpool;* the Defendant *J. H. Simpson* was the registered officer of the *Bank of Liverpool*, and the Defendant *J. Chapman* was the registered officer of the *Union Bank of London*.

In August, 1870, the *Bank of Liverpool* held, as agents for the *Union Bank of London*, two bills of exchange, one for £3925 9*s*. 3*d*., dated the 23rd of May, 1870, and the other for £4054 13*s*. 7*d*., dated the 25th of May, 1870, both being payable sixty days after sight. The bills were drawn upon *J. N. Beach* by *G. Shute*, his correspondent at *New Orleans*, one being drawn against 251 bales of cotton and the other against 253 bales of cotton, shipped in the *William Cummings*.

The bills were presented to *Beach* for acceptance, and there was attached to the first bill the following memorandum: "The *Union Bank of London* holds bill of lading and policy for 251 bales of cotton, per *William Cummings;*" and to the other bill was attached a similar memorandum in respect of the 253 bales of cotton.

J. N. Beach accepted both bills of exchange, as he alleged, in the belief that the *Union Bank of London* had in their possession at the time the said bills of lading, and that the statements to that

effect in the two memoranda were true; that he would have refused to accept such bills of exchange if he had not believed that at the time of their being so presented for acceptance the *Union Bank* had valid bills of lading for the cotton, and that the proceeds of the sale of such cotton would be applicable to the payment of the bills of exchange. *J. N. Beach* did not see the documents referred to in the memorandum when he accepted the two bills of exchange, nor did he demand an inspection of them.

Before the bills became due, *J. N. Beach*, with the assistance of Messrs. *Leather & Marriott*, retired the bills of exchange, and they paid between them £7969 0*s.* 6*d.*, the amount of the bills, less a small sum for rebate of interest, and thereupon the bills of exchange and two documents, purporting to be the bills of lading of the 251 bales and 253 bales of cotton, shipped per *William Cummings*, were delivered up to the Plaintiffs by the *Bank of Liverpool*.

Upon receiving these documents, which appeared to be signed by *G. E. Miller*, as master of the ship *William Cummings*, the Plaintiffs discovered that the signature to both bills of lading had been forged. The Plaintiffs were therefore unable to obtain delivery of the cotton, the genuine bills of lading being held by other persons. The bill prayed a declaration that the Defendants were bound in equity to repay to the Plaintiffs the said sum of £7969 0*s.* 6*d.*

The Defendants, by their answer, stated that the two bills of exchange were accepted by *J. N. Beach* without any condition or qualification whatever, and that the memoranda were attached to such bills of exchange in accordance with the usual custom of the *Union Bank of London* in dealing with those bills, which were called document bills. It was further stated that the *Union Bank of London* were the agents in this country of Messrs. *Schuchardt & Sons* of *New York*, by whom the two bills of exchange were received for value, and were forwarded to them for presentation and realisation.

There was evidence to shew that *Chute* was in the habit of sending consignments of cotton to *J. N. Beach*, and of drawing bills of exchange upon him against bills of lading, and also that a letter was received by *J. N. Beach* from *Shute* on the 23rd of May, 1870,

V.-C. M. 1871 LEATHER v. SIMPSON.

intimating that these two consignments of cotton would be forwarded to him, and that bills of exchange would be drawn by *Shute* upon *J. N. Beach* in the usual manner.

Mr. *Cotton*, Q.C., Mr. *Bardswell*, and Mr. *J. P. Benjamin*, for the Plaintiffs :—

The question is, what is the effect of the document attached by the bank to the bills of exchange when they were presented for acceptance? The words are, "the bank holds bill of lading and policy for 251 bales of cotton, per *William Cummings*." The meaning must necessarily be that the bank was in possession of a bill of lading when, in fact, there was no bill of lading in existence. That is the representation made by the memorandum; it is a guarantee of the genuineness of the bills of lading, and that representation turns out to be false. *Gompertz* v. *Bartlett* (1) and *Polhill* v. *Walter* (2) apply. In *Gurney* v. *Womersley* (3), where the facts shewed that a bill was taken on the faith of an acceptance by a particular firm being genuine, it was held that the acceptance was the essence of the description; and there being in fact no genuine acceptance by that firm, there was a total failure of consideration. The case of *Thiedemann* v. *Goldschmidt* (4) might be considered against the Plaintiffs' claim; but that was decided upon the authority of *Robinson* v. *Reynolds* (5), which, in fact, turned upon a question of pleading, and the decision is not of general application. *Couturier* v. *Hastie* (6) is in our favour, since it was held that the contract contemplated that there was an existing something to be sold and bought, and which was capable of transfer; and this not being the case at the time of the sale, no liability attached to the purchaser. *De Biel* v. *Thomson* (7), *Hitchcock* v. *Giddings* (8), and *Slim* v. *Croucher* (9), also support our view; and in *Wilkinson* v. *Johnson* (10), the Plaintiff was held entitled to recover back the money he had paid on a forged bill of exchange upon discovering at once the mistake, and giving immediate notice of dishonour, to be forwarded by the same post.

(1) 2 E. & B. 849.
(2) 3 B. & Ad. 114.
(3) 4 E. & B. 133.
(4) 1 D. F. & J. 4.
(5) 2 Q. B. 196.
(6) 5 H. L. C. 673.
(7) 3 Beav. 469.
(8) 4 Price, 135.
(9) 1 D. F. & J. 518.
(10) 3 B. & C. 428.

And it is of no consequence whether the bank knew of the fraud or not; they may be perfectly innocent in the transaction; it is sufficient that the Plaintiff *Beach* was led to accept the bill upon the faith of a representation which turned out to be false.

Then, with regard to the jurisdiction of the Court. It is established by *Ramshire* v. *Bolton* (1) that this Court has concurrent jurisdiction with the Courts of Common Law in such cases as these; and this doctrine was fully upheld by Vice-Chancellor *Stuart* in *Hill* v. *Lane* (2).

Mr. *Pollock*, Q.C., Mr. *Pearson*, Q.C., and Mr. *Jackson*, for the Defendants:—

It is entirely a mistake to say that this memorandum attached to the bill of exchange was a guarantee or a representation that the bank was the holder of a genuine bill of exchange. The bill was received by the *Union Bank* with the bill of lading, as agents for a *New York* firm of bankers. In the usual course of business the *Union Bank* forwarded the bill to *Liverpool* for presentation and collection, and, according to their usual custom with all documented bills, the printed form of memorandum was attached, indicating that a document purporting to be a bill of exchange was in their possession. It was for the acceptor, if he thought proper, to call for the production of the bill, which he might have seen, and would, no doubt, have inspected, if he had entertained the least suspicion of its genuineness. He was, however, expecting the presentation of such a bill in pursuance of the letter of his correspondent, the drawer of the bill, who had advised him of the transaction, and the shipment of the cotton. It was probably owing to this expectation that no question was raised by Mr. *Beach* on the subject of the bill of lading. It was upon the faith of his own correspondent's communication that he accepted the bill, and the memorandum by the bank was a mere intimation to him that the expected bill of lading was in the hands of the bank. But, in fact, if the bill of lading had been inspected by Mr. *Beach*, it would have been impossible for him to have discovered the forgery of the name of the captain of the ship, which must have been alike unknown both to

(1) Law Rep. 8 Eq. 294. (2) Law Rep. 11 Eq. 215.

V.-C. M. 1871 LEATHER v. SIMPSON.

the bank and to *Beach*. The Plaintiff *Beach*, moreover, received the bill of lading upon payment of the bill of exchange, and even then he did not discover the forgery; consequently he is in the same position as if he had been shewn the bill of lading at the time the bill was accepted, and this brings the case within the authority of *Thiedemann* v. *Goldschmidt* (1) and *Robinson* v. *Reynolds* (2). The former case is in all respects similar to this, except that the bill of lading was presented with the bill of exchange; there the money was not paid, but the suit was instituted for delivery up of the bill of exchange. The Vice-Chancellor *Stuart*, before whom the case was first heard, granted an injunction to restrain the bank from taking proceedings at law against the Plaintiff, but this decision was reversed on appeal. *Robinson* v. *Reynolds* was a decision to the same effect, and was not a mere decision upon a point of pleading. If the production of a bill of lading does not create a liability, such a memorandum as this cannot do so.

Suppose this had not been the case of a covered or documented bill, but a simple bill of exchange, accepted in the usual manner, in such a case the acceptor would have no remedy against the holder. By acceptance, the drawee admits the signature and capacity of the drawer, and cannot, after thus giving the bill currency, be admitted to prove that the drawer's signature was forged. This is laid down in *Byles* on Bills (3). It was decided in *Ashpitel* v. *Bryan* (4) that the acceptor of a bill cannot be admitted to deny the handwriting of the drawer; and in *Sanderson* v. *Collman* (5) it was laid down that the drawee, after accepting a bill, and thereby giving an apparent validity to it, has no right to set up as a defence to an action against him as acceptor that the name of the drawer was forged, or any other matter invalidating the bill. When the bank presented the bill for acceptance, they could not be in a worse position, because they were holders of a bill of lading which they had taken to cover the bill, than if they had had no such bill of lading.

In this case the equities are equal, but the Defendants have this

(1) 1 D. F. & J. 4.
(2) 2 Q. B. 196.
(3) 8th Ed. pp. 177, 192.
(4) 3 B. & S. 474.
(5) 4 Man. & G. 209.

advantage, that they are right in law, and that the bills were not only accepted, but the money actually paid before the forgery was discovered. They have, therefore, brought themselves within the rule—*Qui prior est tempore, potior est jure.*

Mr. *Cotton*, in reply.

SIR R. MALINS, V.C.:—

This case is one which in a remarkable manner illustrates the perils of commercial life. It is one of perfect good faith on both sides; and the question is, which of two innocent parties is to suffer by the fraud which has been committed by issuing forged bills of lading?

The claim on the part of the Plaintiffs is rested upon this, that the Plaintiff *Beach* accepted the bills on the faith of the representation made by the *Union Bank of London*, contained in the notes attached to the bills: "The *Union Bank of London* holds bill of lading and policy for 251 bales of cotton, per *William Cummings*." It is urged that that is a representation by the bank that they hold a genuine bill of lading, and therefore that the person who is called upon to accept the bill will have the security of a document which will insure to him the delivery of 251 bales of cotton. Against that, it is said, there is no representation of genuineness; there is no guarantee. The bank do not undertake to say whether the bill of lading is good or not; they only say, "We have a bill of lading," the fair meaning of which may possibly be, "We have a document which on the face of it is a bill of lading." Nothing had occurred to excite their suspicion; they believed it to be a bill of lading, and they therefore called it so. Then does this amount to a representation that it was a genuine bill of lading? The question that arises is, whether, by this representation, the position of the Plaintiffs has been in any way altered. Suppose the bill of lading had been forwarded with the bill of exchange, which is the usual course of business. It is perfectly clear, I apprehend, that the Plaintiff *Beach* would not have accepted this bill without the bill of lading accompanying it, if it had been in the hands of parties unknown to him, and who were not so responsible as he knew the *Union Bank* to be. The representation of the *Union Bank* that they

V.-C. M. 1871 LEATHER v. SIMPSON.

had the bill of lading was a sufficient assurance to the Plaintiff *Beach* that that bill of lading would be forthcoming in proper time. He therefore gives credence to their representation, and acts upon the faith of it; but does this make the case different from what it would have been if the bill of lading had actually been forwarded? I cannot come to the conclusion that this puts the Plaintiffs in a different situation from that in which they would have been if the bill of lading had accompanied the bill of exchange. If it had so accompanied the bill of exchange, would *Beach* have accepted it? The best proof that he would is this, that on the 2nd of August, when the Plaintiffs are desirous of having the cotton, the bill of lading is put into their hands; they pay the money on the faith of it; they take the bill of exchange and the bill of lading in the perfect belief that it is a genuine document, make no inquiry with regard to it, take it to the captain of the ship, and then, for the first time, discover that they have been imposed upon, as all parties engaged in the transaction had been. Was there, then, a guarantee by the *Union Bank*? It would be a very dangerous thing for a bank if, where they say they have a document of that kind, they were to be held to guarantee its genuineness. My opinion is, they do nothing of the kind. I think the Plaintiff *Beach*, if the matter had been the subject of the slightest degree of suspicion, ought to have required to see the bills of lading before he accepted the two bills of exchange, in order to test the signature, and see that they were perfectly safe. That is the course which he might have taken, but did not. In my opinion, the Plaintiffs are precisely in the same position as they would have been if the bills of lading had been produced before the bills of exchange were accepted, and they are therefore in the same situation as if this bill of exchange had had annexed to it the bill of lading, and had then been accepted in the belief that the bill of lading was a genuine document. It certainly is of the highest importance to the commercial interests of this country that discredit should never be thrown upon a bill of exchange if it be possible to avoid it. No doubt there are in this Court instances, not so much of commercial bills as bills of exchange, which young men are in the habit of accepting, upon which this Court will always stay an action where a proper case is

made for doing so, but it must be a very peculiar case. What would have been the position of the parties if they had discovered this fraud (as they did on the 2nd of August) before they wanted the cotton? They would have said this: "*Beach* was induced to accept the bill of exchange by fraud; it is not binding." And if they are entitled to recover the money back, as they now seek in this suit to do, it is perfectly clear they would, before they paid the money, have been entitled to get the bill of exchange itself back. But that is a point which is absolutely settled by the case of *Thiedemann* v. *Goldschmidt* (1). I am not able to see that there is a shadow of difference between *Thiedemann* v. *Goldschmidt* and the present case, except this, that here the money was actually paid before maturity, on a rebate of interest, and there the bill remained out. In *Thiedemann* v. *Goldschmidt*, Vice-Chancellor *Stuart* ordered the bill of exchange to be delivered up to be cancelled. The case afterwards came before the full Court of Appeal, consisting of the Lord Chancellor *Campbell*, Lord Justice *Knight Bruce*, and Lord Justice *Turner*, who held that there was no equity for the delivery up of the bill.

That is precisely the position that the present parties would have been in if they had filed a bill to have the acceptances delivered up. If in that case, therefore, there was no equity to have the bill delivered up, it is, in my opinion, a decision that in this case the Plaintiffs have no equity to have the money back. With regard to the case of *Robinson* v. *Reynolds* (2), that was said to turn very much on the question of pleading; but I am not able to look upon it in the same way. It is a precisely similar case. Lord *Denman's* judgment, confirmed by the Court of Exchequer Chamber, is perfectly distinct. Lord *Denman* says: "The plea does not shew that the Plaintiffs"—that is, the holder of the bill, the person who obtained the acceptance on the belief of the genuineness of the bill of lading—"made any representation which they knew to be false, nor that they warranted the bill of lading to be genuine, nor does it disclose that the Defendants accepted the bill of exchange on which the action is brought upon the faith of any assertion by the Plaintiffs, farther than their indorsement upon it, that the bill of lading, which turned out to be forged, was genuine. On the

(1) 1 Giff. 142. (2) 2 Q. B. 196, 202.

V.-C. M. 1871 LEATHER v. SIMPSON.

contrary, it appears by the other averments in the plea, that the drawer of the bill was the correspondent of the Defendants, and that it was upon his authentication of the bill of lading, as referring to goods which he professed to have consigned to them, that they acted."

Now, I think the observations there are very applicable to the present case. *Shute* was the correspondent of the Plaintiff *Beach* at *Liverpool.* He informed him by letter that he was going to send the cotton by the *William Cummings.* It arrives by that ship, and it was the usual course of dealing with the Plaintiff *Beach* that whenever he accepted these bills drawn by *Shute* he had the bill of lading. Therefore he expected that there would be a bill of lading coming from his own correspondent *Shute.* And so far from the *Union Bank* misleading *Beach,* I am of opinion that *Beach* could only have understood it in one way—that *Shute* had transmitted a bill of lading, and the bank had that bill of lading, which would be forwarded for inspection if required. If the bill was accepted, then the bill of lading would be handed over when the bill arrived at maturity, and when the acceptor was called on to pay it. Therefore, I think, to say that there was any misleading by the *Union Bank* is attempting to carry the case far beyond anything that the facts warrant.

As to the general law of misrepresentation, I do not think it necessary to go into it in this case, because the law is perfectly clear, that if the Court was warranted in treating this as a representation by the *Union Bank of London* as if they had said, "We hold the bill of lading, which is a genuine bill of lading, or which we guarantee to be a genuine bill of lading"—then if they had so undertaken, and it turned out to be a bad bill of lading, it would have been money obtained on a representation which was untrue; and the rules of this Court are settled, that when a representation in a matter of business is made by one man to another calculated to induce him to adapt his conduct to it, it is perfectly immaterial whether the representation is made knowing it to be untrue, or whether it is made believing it to be true, if, in fact, it was untrue; because every man making a representation inducing another to act on the faith of that representation must make it good if he takes upon himself to represent that which he does not know to be

true, and he is equally bound if he made it without knowing it to be untrue. Therefore, if the memorandum relied upon had amounted to a representation that the document was genuine or a guarantee, the consequence would be plain that the Plaintiffs must have been indemnified by the *Union Bank of London*, and the money they have received must have been returned, because it was obtained upon a representation which turns out to be untrue. If there be a distinction between this case and the cases of *Thiedemann* v. *Goldschmidt* (1) and *Robinson* v. *Reynolds* (2), I confess it appears to me to be rather more unfavourable to the Plaintiffs, because in *Thiedemann* v. *Goldschmidt* the money had not been paid, whereas here they elected to pay the money on a rebate of interest before the bill became due, which precludes them from saying that it had not arrived at maturity. The Plaintiff *Beach* trusted to his own correspondent *Shute*, that he would not transmit anything but a genuine bill of lading. The equities between these parties are equal; the parties are equally innocent in the transaction; they have all been imposed upon; but there is this difference, that one of them, by the course of the transaction, has been in possession of the money, and I am at a loss to see any ground upon which I can be justified in making a decree that that money should be restored. I can see no distinction between a bill filed to have the acceptance delivered up before it has arrived at maturity, and a bill filed to have the money restored after the bill has arrived at maturity, or has been treated as having arrived at maturity, and the amount of it paid.

Upon these grounds I am of opinion that the bill fails, and must be dismissed.

Upon the Court being pressed to give costs, the Vice-Chancellor dismissed the bill with costs, but refused to allow interest upon the money which had remained in the hands of the *Bank of Liverpool* since the injunction was granted.

Solicitors for the Plaintiffs: Messrs. *Chester & Urquhart.*
Solicitors for the Defendants: Messrs. *Lyne & Holman.*

(1) 1 D. F. & J. 4. (2) 2 Q. B. 196.

V.-C. M.
1871
Feb. 17.

In re WIDDOW'S TRUSTS.

Payment out of Court—Presumption of being past Child-bearing—Widow aged Fifty-five Years and Four Months—Spinster aged Fifty-three Years and Nine Months.

Money ordered to be paid out of Court on the presumption that a widow aged fifty-five years and four months, who had never had any children, and a spinster aged fifty-three years and nine months, would not have any children.

THIS was a Petition by *Sarah Willan*, a widow, and *Mary Ann Homan Widdows*, a spinster, for payment out to them of two sums of £829 10*s.* each, which had been paid into Court.

The Petitioners were two of the children of *Thomas Widdows*, and the money in question represented two residuary shares in his estate, to one of which each of them was entitled under his will absolutely in case she had no children; but in case of having any child or children, only for her life, with a power of appointment in favour of such child or children.

Sarah Willan was born on the 8th of October, 1815, and was consequently aged about fifty-five years and four months, and had never had any children. *Mary Ann Homan Widdows* was born on the 2nd of June, 1817, and was consequently aged nearly fifty-three years and nine months.

The Petition asked to have the money paid out on the assumption that the Petitioners would not now have any children.

Mr. *Bristowe*, Q.C., and Mr. *Bradford*, in support of the Petition:—

The Court will act upon the presumption that neither of these ladies will have any children. Most of the authorities on the subject are collected in the note to *Edwards* v. *Tuck* (1), and several of them allowed the presumption to arise at an earlier age than that of Mrs. *Willan*. But, besides those cases, there is a decision of Vice-Chancellor *Kindersley*, in *Forty* v. *Reay*, referred to in *Dart* on Vendors and Purchasers (2), in which he allowed

(1) 23 Beav. 272.

(2) 4th Ed. vol. i. p. 320.

the presumption in the case of a lady aged fifty-three, which would cover the case of Miss *Widdows*.

Mr. *G. Sangster Green*, for the trustees.

SIR R. MALINS, V.C. :—

As Vice-Chancellor *Kindersley* has allowed the presumption in the case of a lady aged fifty-three, I suppose I may do so also. The order will, therefore, be as prayed.

Solicitors: Messrs. *Bailey, Shaw, & Smith.*

V.-C. B. 1871 Jan. 28.

GALLIERS *v.* METROPOLITAN RAILWAY COMPANY.

Lands Clauses Act, 1845, *s.* 78—*Purchase-money paid into Court—Petition by Claimant—Jurisdiction.*

Lands having been taken by a railway company, the value awarded, abstract furnished, and no objections raised, the company took possession, but did not pay the money until bill filed by the vendors, who obtained a decree ordering payment on a certain day of the sum awarded, interest from the date of taking possession, and costs. Immediately before the day on which payment was to be made, the company, alleging that the abstract shewed a title to a moiety only of the lands, gave notice of their intention to pay the money into Court; and they did pay into Court the sum awarded to an account entitled "*Ex parte* the company, The account of the vendors." They afterwards paid to the vendors a sum (alleged to be insufficient) as for interest.

Upon Petition presented by the vendors, in the suit, and in the matter of the *Lands Clauses Act*, 1845:—

Held, that the Court had jurisdiction, under the 78th section, to order the money to be paid over to the Petitioners.

PETITION.

On the 4th of December, 1865, the secretary of the Defendants, the *Metropolitan Railway Company*, gave to the Plaintiffs, *George Galliers* the younger and *Herbert Yeomans*, as trustees of the marriage settlement of *James Norman* and *Mary Ann*, his wife, notice to treat for some house property in the city of *London*. The Plaintiffs furnished particulars; and the price not being agreed upon, arbitrators and an umpire were appointed. On the 22nd of November, 1866, the value was awarded by the umpire at £5100. In December, 1866, an abstract was delivered, but no objections were taken on behalf of the Defendants, who took possession on the 25th of December, 1866.

After several fruitless applications, the Plaintiffs' country solicitor, in July, 1869, pressed for completion of the purchase. On the 3rd of August, the Defendants' solicitors suggested an arrangement for the continuance of the purchase-money on the security of the property. To this the Plaintiffs' solicitor objected, stating that the trustees were most anxious to get rid of their trust, and were determined to do so. Failing, however, to obtain their object, the Plaintiffs, on the 10th of November, 1869, filed a bill

against the company, stating as above, alleging that the Defendants had long since accepted the title, and praying that the Defendants might be ordered to complete, and to pay the £5100, with interest and costs.

On the 15th of January, 1870, the Defendants answered, admitting the above statements, and that they had made no objection to the title, but stating that they had not examined or investigated the title, and submitting whether they had accepted it. They admitted that they had not completed the purchase, but said that they had not refused or declined, and did not refuse or decline to complete the purchase.

On the 28th of January the bill was amended, and, as amended, prayed in addition that the Plaintiffs might be declared entitled to a lien for the principal, interest, and costs; in default of payment, for a sale; in the meantime for an injunction to restrain the Defendants from using or continuing to remain in possession of the premises; and for a receiver.

On the 7th of May, 1870, upon motion for decree, an order was made that the Defendants were bound specifically to perform the agreement and award; and it appearing that the Defendants had accepted the title, and had been in possession since the 25th of December, 1866, that the Defendants should, on or before the 24th of June then next, pay the £5100, with interest at 5 per cent., from the 25th of December, 1866, and costs of the arbitration and suit, with consequential directions. The Plaintiffs were declared entitled to a lien; and it was ordered, in the event of the sum not being paid, that the Plaintiffs be at liberty to apply for a sale, injunction, and receiver.

On the 23rd of June, 1870, the Plaintiffs' country solicitor received the following telegram from the Defendants' solicitors:—

"We are advised title extends only to half the property; explanation may be possible; money, however, is ready, and, pursuant to decree, must to-morrow be paid into Court, unless you write us to-day that you will complete title, and receive the money."

On the same day the Plaintiffs' solicitor replied: "My clients decline to interfere with the decree, and the money must be paid."

On the 24th of June the Defendants' solicitors paid £5100 into Court, to the credit of an account entitled "*Ex parte Metro-*

V.-C. B. 1871 GALLIERS v. METROPOLITAN RAILWAY CO.

politan Railway Company, The account of *George Galliers* the younger and *Herbert Yeomans,* trustees of *James Norman* and *Mary Ann,* his wife, in respect of premises in *Red Cross Street* and *Bell Chambers Passage,* in the parish of *St. Giles-without-Cripplegate,* in the city of *London.*"

On the 13th of July, 1870, Defendants' solicitors sent to the Plaintiffs' solicitor a cheque for £463 15*s.* 1*d.* as interest, which sum the Plaintiffs' solicitor alleged to be insufficient, claiming £489 11*s.* 7*d.* on that account.

On the 15th of July the Defendants' solicitors wrote to say they declined assenting to the money being paid out until a good title was shewn; and afterwards, for the first time, sent in requisitions for title, which the Plaintiffs' solicitor declined to answer.

Plaintiffs then presented this Petition in the suit, in the matter of the trusts of the settlement of which they were trustees, and in the matter of the *Lands Clauses Consolidation Act,* 1845, and the *Metropolitan Railway Act,* 1854, stating the above facts, and praying that the £5100 might be paid out to them, and that the Defendants might be ordered to pay them the balance of interest, and the costs of and incidental to the present application.

Mr. *Amphlett,* Q.C., and Mr. *Hallett,* for the Petitioners, cited *Burnell* v. *Brown* (1).

Mr. *Bristowe,* Q.C., for the company:—

According to the abstract, only one half of the estate belongs to the trustees. We cannot dispute the decree, but if the Petitioners had applied for an injunction, we then could have applied for a re-hearing, and there might have been a reference as to title.

Proceeding as they have done, the Petitioners are not entitled to the money until they tender us a conveyance. They cannot, in fact, give us a conveyance.

As to the moiety, the Petitioners have since the decree accepted £463 15*s.* 1*d.* on account of interest; the only difference between the parties being a sum of £25 odd.

It is only under the *Lands Clauses Act* that the Petitioners can get the money out. In order to do that they must abandon the decree; and this is a strong case for having the cause re-heard.

(1) 1 Jac. & W. 168.

SIR JAMES BACON, V.C.:—

It is perfectly plain that the decree establishes the Petitioners' rights, and nothing is required to be done but to put the decree in execution in order that the Petitioners may obtain their rights.

The Petitioners now ask for payment to them of a sum of money which has been paid into Court. But there is no necessary identity between the sum so paid in, and the sum to which the Petitioners are entitled under their decree. The company, by wrong, as it seems to me, have chosen to pay a sum of money into Court, under the *Lands Clauses Act*, to an account entitled "*Ex parte* the Company, The account of the vendors" [His Honour read the words:—]. They had no right to pay that money in, but if the Petitioners come here, under the *Lands Clauses Act*, to have it paid out, they must fulfil the conditions of the whole of the Act of Parliament. Plain as the justice of the case is, frivolous and dishonest as the opposition on the part of the company is, with every disposition to do justice to the Petitioners, I can make no order, unless I am satisfied of my power to do so under the statute.

Mr. *Amphlett*, in reply:—

The Court is empowered to order the money to be paid to us under the 78th section. The company allege that we have "neglected or failed" (sect. 76) to make out a title, and have paid in on that assumption. We shew that they were wrong, and have satisfied the Court that we have a title.

In reply to a question from the Court,

Mr. *Bristowe* said he could not dispute that the payment into Court was a payment in respect of the purchase-money.

The VICE-CHANCELLOR:—My doubts are removed, and I make the order.

The order will be for payment of the £5100, and costs, to the Petitioners as prayed.

Solicitor for the Petitioners: Mr. *B. Hunt*, agent for Mr. *James Jay, Hereford.*

Solicitors for the Company: Messrs. *Burchells.*

V.-C. B.
1871
Jan. 31.

HALL *v.* HARGREAVES.
HARGREAVES *v.* HALL.

Practice—Evidence—Cross Suit—Replication—Motion for Decree.

On the day on which the evidence was closed in a suit in which Replication had been filed, the Plaintiffs, in a cross suit, served notice of motion for decree in their suit.

A month's time was obtained by the Plaintiff in the original suit for putting in his evidence upon the motion for decree, and the Plaintiffs in the cross suit subsequently filed a large mass of affidavits in reply. On motion by Plaintiff in the original suit to suppress this evidence in reply, on the ground that it was an unfair attempt by Plaintiffs in the cross suit to obtain an advantage by putting in new evidence on matters in issue in the original suit after publication had passed:—

Held, that there had been no such irregularity on the part of Plaintiffs in the cross cause in the conduct of their suit, as to justify the Court in suppressing the evidence filed by them in reply, but that cross-examination in Court would be directed upon the affidavits in reply, notwithstanding such affidavits were filed in a suit intended to be heard on motion for decree.

MOTION, on behalf of Defendant in *Hargreaves* v. *Hall*, that an order might be made to the effect that Plaintiffs in that suit might not be at liberty to use the affidavits filed by them on the 21st of November, 1870, in that suit, or otherwise; that he (Defendant) might be at liberty to withdraw his order, dated the 30th of June, 1870, to read the affidavits filed by him in *Hargreaves* v. *Hall* as evidence in *Hall* v. *Hargreaves*, and might be at liberty to file new affidavits in that suit; and that Defendants in *Hall* v. *Hargreaves* should not be at liberty, under any order now obtained or to be obtained by them for that purpose, or otherwise, to use in the suit of *Hall* v. *Hargreaves*, the affidavits filed by them in reply in *Hargreaves* v. *Hall* so far as such affidavits were in reply on any matters which were in issue in *Hall* v. *Hargreaves*; or that such an order might be made as would prevent the Plaintiff in *Hall* v. *Hargreaves* from being, in case the said suits should come on to be heard together, in any way prejudiced through the said affidavits being so filed as aforesaid; and that, otherwise, liberty to reply in *Hall* v. *Hargreaves* to such last-men-

tioned evidence might now be given to the said *John Hall;* and, further, that if such last-mentioned evidence be permitted to be used in *Hall* v. *Hargreaves* for any purpose, liberty be reserved and given to *Hall* to cross-examine in open Court the witnesses who had given such evidence, notwithstanding that such affidavits were filed in a suit intended to be heard on motion for decree.

The material dates of the proceedings in the two suits are as follows:—

Hall v. *Hargreaves.*	*Hargreaves* v. *Hall.*
1868.	
May 28.—Bill filed.	
June 2.—Amended bill filed.	
Nov. 13.—Answer to amended bill filed.	
1869.	1869.
	May 14.—Bill filed.
	July 22.—Order for sale of colliery upon interlocutory motion.
Sept. 3.—Re-amended bill filed.	Sept. 3.—Voluntary answer of Defendant filed.
Oct. 1.—Answer to re-amended bill.	
Dec. 14.—Replication filed.	
1870.	1870.
Successive orders on Plaintiff's application to enlarge time for closing evidence until 14th May, 1870.	
May 14.—Time enlarged on application of both parties until 21st May, 1870.	
„ 19.—Order made giving liberty to Defendants to read at hearing of this cause the pleadings in *Hargreaves* v. *Hall*, the order of 22nd July, 1869, thereon, and the affidavits filed this day in support of the motion for decree thereon.	May 19.—Affidavits in support of motion for decree filed.
Affidavits of *Williamson* and another filed on the part of Defendants.	Order made giving liberty to Plaintiffs to read at hearing of this cause the pleadings in *Hall* v. *Hargreaves*, and the affidavits filed in that suit.
„ 21.—Evidence closed.	„ 21.—Notice of motion for decree.
„ 21.—Notice of evidence on behalf of Defendants served.	
Notice of evidence on behalf of Plaintiff served.	
June 3.—Order made on application of Plaintiff to enlarge the time for service of notice of intention to cross-examine until 1st July, 1870.	June 3.—Order obtained by Defendant enlarging the time for filing affidavits in answer to the motion for decree until 1st July.

V.-C. B.

1871

HALL v. HARGREAVES.

HARGREAVES v. HALL.

Hall v. *Hargreaves.*

1870.

June 16.—Subpœna to hear judgment served.

„ 30.—Order giving Plaintiff liberty to read all pleadings, orders, and affidavits made and filed in *Hargreaves* v. *Hall.*

July 1.—Notice of Plaintiff's intention to cross-examine Defendants' witnesses at the hearing served.

Notice of Defendants' intention to cross-examine Plaintiff's witness at the hearing.

„ 9.—Special examiner appointed to take cross-examination of Plaintiff.

Aug. 30.—Order on application of Defendants for special examiner to take cross-examination of Defendants.

Oct. 26, 27, 28.—Cross-examination of Plaintiff and Defendants taken.

„ 31.—Depositions filed.

Nov. 25.—Amended notice as to evidence not filed on 21st of May, 1870, intended to be used by Plaintiff on the hearing of this cause, served.

Hargreaves v. *Hall.*

1870.

June 30.—Order giving Defendant liberty to read at hearing of this cause all pleadings, orders, and affidavits made or filed in *Hall* v. *Hargreaves.*

July 1.—Notice of the evidence which Defendant intended to use in answer to the motion for decree, served.

„ 20.—Time for filing Plaintiffs' evidence in reply enlarged till 9th August.

Aug. 9.—Ditto, till 20th September.

Nov. 8.—Ditto, till 22nd November.

„ 11.—Amended notice of Defendant's evidence intended to be read by him on the motion for decree, served.

„ 19.—Order for Plaintiffs to be at liberty to read depositions filed in *Hall* v. *Hargreaves.*

„ 21.—Plaintiffs' evidence in reply filed.

„ 22.—Notice of evidence intended to be read by Plaintiffs on the hearing of the motion for decree, in reply to Defendant's evidence, served.

Dec. 6.—Notice of Defendant's intention to read depositions filed in *Hall* v. *Hargreaves.*

Order made enlarging time for service of notice of intention to cross-examine witnesses, till 11th January, 1871.

(Enlarged by successive orders until the 1st February, 1871).

In answer to an inquiry by the solicitors of *Hall*, whether it was intended, on behalf of Messrs. *Hargreaves*, to read in *Hall* v. *Hargreaves* the evidence filed in reply in *Hargreaves* v. *Hall*, the solicitors of Messrs. *Hargreaves* replied: "As is invariably the case on the hearing of causes and cross causes, these two suits will be called on together; and, practically, the evidence in each will be the evidence in both."

Under these circumstances, *Hall* now moved in the terms above stated.

Sir *Roundell Palmer*, Q.C., Mr. *Kay*, Q.C., and Mr. *Bedwell*, in support of the motion:—

This motion is strictly in accordance with the old practice, by which it is settled that evidence which has been taken in a cross cause upon matters in issue in the original cause, after publication has passed in the original cause, will be suppressed: *Pascall* v. *Scott* (1); and there is nothing in the new practice (15 & 16 Vict. c. 86), or the General Orders thereunder, to alter that practice. If Messrs. *Hargreaves* are allowed to use this evidence, which is as much directed to the evidence given in *Hall* v. *Hargreaves* as to *Hargreaves* v. *Hall*, they will be gaining an unfair advantage, as the evidence has long since been closed in *Hall* v. *Hargreaves*. It can never have been intended that Plaintiffs in a cross suit, after replication has been filed and the evidence closed in the original suit, should be allowed, by giving notice of motion for decree, to bring in new evidence upon the matters in issue in the original suit, which the Plaintiff in such original suit, from the evidence being closed in it, has no means of meeting. In any case, we are entitled to cross-examine their witnesses in Court at the hearing: *Neve* v. *Pennell* (2).

Mr. *Little*, Q.C., Mr. *Pearson*, Q.C., and Mr. *Lindley*, for Messrs. *Hargreaves, contrà*:—

This motion seeks to deprive Messrs. *Hargreaves* of the right given to them by 15 & 16 Vict. c. 86, s. 15, and the General Orders founded thereon, of using the affidavits filed in their own suit, and must be refused. Nothing has been done by Messrs.

(1) 1 Ph. 110. (2) 1 H. & M. 252.

V.-C. B. 1871 HALL v. HARGREAVES. — HARGREAVES v. HALL.

Hargreaves which is not strictly consistent with the practice of the Court. Their suit is a distinct and independent suit, and not a cross suit; and, if so, *cadit quæstio*. But even if taken to be a cross-suit, Messrs. *Hargreaves* were not bound to take the same course as *Hall*, and file replication; but they might elect to serve notice of motion for decree. According to the old practice, "Depositions of witnesses in the cross cause to matters not put in issue by the original cause may however be used, notwithstanding they have been taken after publication passed in the original cause:" *Daniell's* Chancery Practice (1); and by the new practice the Plaintiff, even in a cross suit, is at liberty to serve notice of motion for decree, and to prepare his evidence in the manner prescribed by the Act of 1852, and the Consolidated Orders in reference to the procedure upon motion for decree. In any case, *Hall* ought to be bound by what he deliberately elected to do in June, 1870, when he obtained an enlargement of the time for filing affidavits in answer to the motion for decree. Since then he has been cross-examined in his own suit, and he cannot now be allowed to begin his defence over again, and reconstruct his evidence entirely.

[They did not object to having their witnesses cross-examined in Court at the hearing.]

Mr. *Bedwell*, in reply.

SIR JAMES BACON, V.C.:—

There is nothing, in my opinion, more unsatisfactory and more dangerous than to have to deal with evidence which has been prepared in the cause before the cause comes on to be heard. It is impossible to say what inconvenience may result from it, and the only safe course the Court can pursue is to rely upon established rules. It has been suggested that a trick has been played by one of the parties upon the other. I cannot tell how that may be; but I have every confidence that when the cause comes to be heard the Court will take care that no trick is successful, that no evidence is admitted which ought not properly to be admitted, and that, if anything remains doubtful when the evidence has been considered, the Court will have the means of directing such further inquiry

(1) 1st Ed. p. 584.

V.-C. B.
1871
HALL v. HARGREAVES.
HARGREAVES v. HALL.

in the shape of evidence in Court, or otherwise, as it may think necessary for the purposes of justice.

Now, I do not find that any irregularity has been practised on either side. The parties in this cause and cross cause, for I have no doubt that the later suit is properly called the cross cause, have dealt with their causes in the way they thought best. The one filed a replication, and the other gave notice of motion for decree. In the cause in which replication was filed the evidence is closed and complete. The other is carried on regularly, upon notice of motion for decree, stating the names of the witnesses by whom the Plaintiff seeks to support his case; the Defendant giving notice of the affidavits which he means to read. Then it is said that the Plaintiffs in the second cause, *Hargreaves* v. *Hall,* obtained an advantage, because, under the pretence of replying to the affidavits which Defendant made in that suit, they have in truth replied upon the evidence given in *Hall* v. *Hargreaves,* which they have no right upon any ground or principle to do. In the first place, I cannot assume now what use may be made of that evidence when *Hall* v. *Hargreaves* comes to be heard; but I know that the Court will be on its guard, and the parties will be on their guard, and will not suffer any improper influence to be exercised, because that which I admit is a very great inconvenience is introduced by these affidavits in reply. But how can I say, against the Plaintiffs in *Hargreaves* v. *Hall*—who have only done that which the rules of the Court have prescribed for them, who have transgressed them in no way—how can I say that I shall suppress the evidence which they have gone into? There is no ground whatever for doing that; and, upon the other branch of the notice of motion, there is no ground for attempting to undo that which has been done in *Hall* v. *Hargreaves,* to withdraw the evidence in that suit, or, in short, to impose any fetters whatever upon the parties who have gone into this evidence in this way; with this exception only, that I embrace the offer which has been made by Plaintiffs in *Hargreaves* v. *Hall,* and authorize the cross-examination of witnesses who, without that consent and without the order of the Court, are not liable to be cross-examined. That will, I believe, do full justice between the parties. To do anything but that would be to speculate and probably come to a

V.-C. B. 1871 HALL v. HARGREAVES. HARGREAVES v. HALL.

wrong conclusion. There will be no difficulty, when the cause comes on to be heard, if that cross-examination, to which I think the Plaintiff in *Hall* v. *Hargreaves* is fairly entitled, takes place. He is clearly entitled to it because of the submission which Plaintiffs in *Hargreaves* v. *Hall* make at the Bar, that the cross-examination may take place in Court, which is the best way of correcting any possibility of danger to either party. I must, therefore, refuse the motion, except as to the cross-examination taking place in Court. The costs will be reserved until one or other of the causes is heard.

Solicitors: Messrs. *Shaw & Tremellen*, for Messrs. *Handsley & Artindale, Burnley;* Mr. *J. Elliot Fox*, for Messrs. *Earle, Son, Orford, & Co., Manchester.*

V.-C. B. 1871 Feb. 2.

SPITTLE *v.* WALTON.

Practice—Evidence—Affidavit—Jurat—Witness of unsound Mind.

Before the affidavit of a person suffering from mental delusions, and in confinement in a lunatic asylum, can be received, his mental condition must first be ascertained by preliminary inquiry before the Court or some person specially delegated for that purpose; and therefore an affidavit sworn by a person in a lunatic asylum, without any notice in the jurat of the circumstances under which or the place where it was sworn, was ordered to be taken off the file.

MOTION, on behalf of Defendants, that the affidavit of *Joseph Beddoe*, sworn on the 9th of January, 1871, and filed in this cause on the 11th of January, 1871, and intended to be used by Plaintiff in support of his motion for decree, might be taken off the file, on the ground that *Beddoe* was at the time of swearing his affidavit of unsound mind.

The suit involved certain questions of account arising out of an alleged partnership at will in a colliery between the Plaintiff and the Defendants.

The colliery had been sold in May, 1865, and *Beddoe*, who was an accountant at *West Bromwich*, had been employed to prepare an account shewing the shares to which, according to the partner-

ship agreement, the Plaintiff and the Defendants were respectively entitled in the proceeds of the sale.

The bill was filed in March, 1870, and on the 11th of January, 1871, notice of motion for decree was served by the Plaintiff. Amongst the affidavits mentioned in the list attached to the notice of motion was that of *Joseph Beddoe*, filed on the 11th of January, 1871, which it was now sought to take off the file.

It appeared that, on the 9th of December, 1870, *Joseph Beddoe* having become affected in his mind from overwork, was, on the certificate of a medical practitioner, removed as a person of unsound mind to a private lunatic asylum at *Sutton Coldfield*, kept by Dr. *Bodington*, where he had remained ever since.

The particular facts indicating insanity observed by the gentleman who had signed the certificate were, that the patient "imagined himself a criminal and about to be hanged, and his wife turned out of doors by three devils," and this without any previous condition of intemperance.

The affidavit prepared by Plaintiff's solicitor was sent to a Mr. *Addenbrooke*, a solicitor and commissioner, at *Sutton Coldfield*, with a request that *Addenbrooke* would see Dr. *Bodington*, and ascertain from him if *Beddoe* was in a fit state to be sworn.

On the 9th of January *Addenbrooke* called at the asylum, and was told by Dr. *Bodington* that *Beddoe's* health was much improved, and that he considered he (*Beddoe*) understood what he was about, and was fit to make the affidavit. Accordingly, *Addenbrooke* saw *Beddoe*, and went through the affidavit with him, paragraph by paragraph, asking him, as each paragraph was read, if he understood and could speak to the facts as stated, to which *Beddoe* answered that he could; and the oath was administered to him by *Addenbrooke*. It was further stated by *Addenbrooke*, that in the course of the conversation *Beddoe* mentioned that one of the partners named in the affidavit, in addition to expressing his satisfaction with the accounts prepared by *Beddoe*, had given him a £5 note for his trouble.

During the whole of the time that *Addenbrooke* was with him, *Beddoe* "was perfectly quiet and rational, and evinced a full acquaintance with the statements contained in the affidavit and with the subject-matter of the suit."

V.-C. B. 1871 SPITTLE v. WALTON.

The affidavit commenced: "I, *Joseph Beddoe*, of *West Bromwich*, in the county of *Stafford*, accountant, make oath, and say as follows:" And the jurat was "Sworn at *Sutton Coldfield*, in the county of *Warwick*, the 9th day of January, 1871, before me, *Henry Addenbrooke*, a commissioner to administer oaths in Chancery in *England*."

Evidence was given by the medical man who had signed the certificate upon which *Beddoe* was removed to the asylum, that when he saw him on the 9th of December, 1870, and again on the 24th of January, 1871, he was of unsound mind.

Dr. *Bodington* stated, in his affidavit, that *Joseph Beddoe's* recovery was uncertain.

Mr. *Kay*, Q.C., and Mr. *Maidlow*, in support of the motion:—

The affidavit is irregular and improper, and must be taken off the file. There is no mention in the jurat that it was sworn in a lunatic asylum, or that the deponent was in confinement as a person of unsound mind. Attention should have been called to these facts; and as in the case of a deaf or dumb person, the jurat should have expressed that the deponent fully understood the contents of his affidavit before he was sworn: *Attorney-General* v. *Malim* (1); *Pilkington* v. *Himsworth* (2); —— v. *Christopher* (3); *Daniell's* Chancery Practice (4).

The proper course in the case of a lunatic witness is pointed out in *Reg.* v. *Hill* (5). The Judge must first examine the person of unsound mind, tendered as a witness, to see whether he understands the nature and sanction of an oath, and witnesses may be called to shew that he is not to be credited because he labours under insane delusions. Even assuming the jurat not to be irregular, no proper precautions were taken by the commissioner, who, as shewn by his own evidence, did not attempt to examine *Beddoe* as to his understanding the nature of an oath. We object to the commissioner's forming an opinion on a mere *ex parte* examination, which was in no way directed to the delusions under which the alleged lunatic suffers. Before this affidavit can be received in

(1) You. 376.
(2) 1 Y. & C. Ex. 612.
(3) 11 Sim. 409.
(4) 5th Ed. p. 793.
(5) 20 L. J. (M.C.) 222; 2 Den. C. C. 254.

evidence, the state of *Beddoe's* mind must be tested by examination, either before a special examiner or before the Judge in open Court.

Mr. *Mackeson*, Q.C., and Mr. *Begg*, for the Plaintiff:—

The notice of motion states that *Beddoe* was of unsound mind at the time of swearing this affidavit, but the only evidence adduced is, that he was of unsound mind when seen on the 9th of December, 1870, and again on the 24th of January, 1871, there being nothing to shew that he was not perfectly capable of understanding and swearing to an affidavit on the 11th of January. It is, therefore, begging the question to say that the jurat ought to have mentioned the fact that he was of unsound mind. We say that he was not a lunatic at the time of swearing his affidavit, and the fact of his volunteering a statement in reference to matters deposed to in the affidavit, is important, as shewing that he thoroughly understood what he was swearing to. He is subject to occasional attacks of monomania, which is distinguishable from lunacy, and does not render him inadmissible as a witness: the question in cases of partial incapacity being not of admissibility, but merely of what credibility is to be given to his testimony. As was laid down in *Reg.* v. *Hill* (1): "*Primâ facie*, he was quite fit to be sworn (even though it was a criminal case). If, however, in the course of the trial, he shewed his evidence to be tainted with insanity, then the jury should have attached no weight to it." In *Banks* v. *Goodfellow* (2), partial unsoundness of mind not operating upon his mind in regard to testamentary disposition, was held not to render a person incapable of disposing of his property by will; and again, in *Cartwright* v. *Cartwright* (3), a will made in a lucid interval, between fits of insanity preceding and following it on the same day, was pronounced for.

SIR JAMES BACON, V.C.:—

I have no doubt whatever in this case. Though satisfied that there was no wilful misconduct on his part, I do not think that the commissioner discharged his duty properly in taking that affidavit

(1) 20 L. J. (M.C.) 222; 2 Den. C. C. 254.
(2) Law Rep. 5 Q. B. 549. (3) 1 Phillim. 90.

V.-C. B. 1871 SPITTLE v. WALTON.

and describing it as sworn at *Sutton Coldfield*, without stating that it was taken in a lunatic asylum. Therefore, if the case had rested alone on the defect in the jurat, I should have been obliged to order the affidavit to be taken off the file. *Reg.* v. *Hill* (1) establishes that, if a person who is believed to be suffering from monomania is tendered as a witness, a preliminary inquiry must be instituted before that person's evidence can be listened to, and upon the preliminary issue of the competency of *Beddoe* thus tendered, he must be examined *vivâ voce*. Independently, however, of the jurat, there are other good reasons for rejecting this affidavit. The Plaintiff's solicitor "precognosces," or, in other words, prepares a statement from instructions in writing, which is sent to the commissioner, and by him read over to the alleged lunatic, who assents to it, paragraph by paragraph, in this cut and dried form. It is impossible to say that there was any examination of the man's mental condition by the commissioner, or any such inquiry into his competency to give evidence, as is necessary both here and at common law before his evidence can be received. The affidavit is, in my opinion, wholly irregular and improper, and must be taken off the file. The Plaintiff must pay the costs of the motion.

Solicitors: Messrs. *Mackeson, Taylor, & Arnould;* Mr. *J. Needham.*

(1) 20 L. J. (M.C.) 222; 2 Den. C. C. 254.

VISCOUNT NEWRY *v.* EARL KILMOREY.

V.-C. B.
1871
Feb. 16.

Practice—Interrogatories—Amendment.

After exceptions for insufficiency to an answer had been allowed, the Plaintiff obtained an order of course to amend his bill and interrogatories, and a new copy of the amended interrogatories, embracing much that was contained in the original interrogatories, was served upon the Defendant:—

Held, that, as at the time of obtaining the order to amend the Plaintiff had not had any answer to the bill, he was entitled, on such amendment, to serve the Defendant with amended interrogatories; and a motion by Defendant to take them off the file was refused.

MOTION, on behalf of Defendant, that the interrogatories filed by Plaintiff to his re-amended bill on the 23rd of January, 1871, for examination of Defendant might be taken off the file, on the ground that they were irregular and improper.

The bill was filed on the 8th of June, 1870. On the 25th of June, before filing interrogatories, the Plaintiff amended his bill in many important particulars. On the 28th of July, Defendant put in his answer to the amended bill. On the 27th of October, Plaintiff filed exceptions to Defendant's answer for insufficiency; and on the 16th of December the exceptions were allowed, and time given for putting in a further answer. This further answer was prepared and settled, and, on the 14th of January, engrossed, and sent to the Defendant for the usual declaration upon honour before a commissioner, and notice was given to the Plaintiff.

On the 18th of January, 1871, an order of the 16th of January, giving the Plaintiff liberty to re-amend his bill and to amend the interrogatories, was served upon Defendant, in consequence of which the further answer was not filed. On the 23rd of January a new copy of the amended interrogatories was served upon Defendant. These interrogatories were stated to be, for the most part, a repetition of the first interrogatories, and by the note at the end the Defendant was required to answer them all.

The Defendant now moved to take these interrogatories off the file as irregular and improper.

Mr. *Cookson*, in support of the motion:—

The interrogatories which have been served are irregular and

V.-C. B. 1871 VISCOUNT NEWRY v. EARL KILMOREY.

improper, as they are not confined to the new matter introduced by amendment, but embrace, without distinguishing between the old and the new matter, everything upon which the Defendant has been already interrogated, and prepared his answer. The interrogatories filed to an amended bill must be confined to the amendments; and if the Plaintiff desires to interrogate after amendment as to any part of the original bill, he must obtain leave from the Court: *Southampton Steamboat Company* v. *Rawlins* (1). To call upon the Defendant to answer these new interrogatories, which include the whole of the bill not only introduced by amendment, but that which was in the original and retained in the amended bill, is irregular and oppressive, and the interrogatories must be taken off the file: *Drake* v. *Symes* (2).

Mr. *Freeling*, for the Plaintiff:—

Before answer the Plaintiff may obtain an order as of course to amend his bill and also his interrogatories. Here there has been no answer, as the answer was held insufficient on exceptions: *Bird* v. *Hustler* (3); and therefore the common order of course to amend was rightly obtained; and upon that order, which has not been discharged, Plaintiff is entitled to have the amendments and the exceptions answered. *Drake* v. *Symes* does not apply, as in that case the amendment was after answer, and the Defendants were required by the new interrogatories to answer not only the amendments, but matter already answered; and in *Southampton Steamboat Company* v. *Rawlins* the Plaintiff had not filed interrogatories to the original bill; and it was held that the Plaintiff, who had by delay lost his right to require an answer, could not recover it by a merely formal amendment.

Mr. *Cookson*, in reply.

SIR JAMES BACON, V.C.:—

Nothing is better settled in practice, as I understand it, than that an imperfect answer is no answer at all, and I do not understand what is the meaning, technically, of an answer *pro tanto* to

(1) 12 W. R. 285. (2) 2 D. F. & J. 81.
(3) 1 Russ. & My. 325.

a Plaintiff, whose clear right is to have an answer, that is, a complete answer. There is no pretence for saying that these interrogatories are irregular, because the order which was obtained *ex parte* cannot be impeached for irregularity. Then it is said that the amendments of the interrogatories are improper. Whether there was any ground for saying that, I cannot form any opinion without reading through the bill, the *pro tanto* answer, and the interrogatories as amended. That is no part of my duty; besides which, it would be most inconvenient if any such examination of the pleadings were to take place at this stage of the proceedings. The Plaintiff's right being to have an answer, I find it not disputed that up to this time he has had no answer. When he obtained the order at the Rolls, his right to have an answer upon his amended interrogatories was, in my opinion, irresistible. I have heard nothing to induce me to believe that the amendments which have been made are improper. That they may be troublesome to answer I can easily conceive; it is not always the object of a Plaintiff in framing his interrogatories to make them pleasant and agreeable for the Defendant to answer. His right is to have an answer if he uses the means which the practice of the Court allows him for asserting that right.

The cases cited do not apply, for in *Drake* v. *Symes* (1) the very point of the decision is, that there had been an answer—full, complete, perfect.

The other case of the *Southampton Steamboat Company* v. *Rawlins* (2) is exactly upon the same principle. In that case the Plaintiff had allowed the time limited for filing his interrogatories to pass without calling for an answer, but by amending his bill he thought he could reinstate himself in the rights which he had lost, and the Court held he could not.

It was suggested that it would have been better if Plaintiff's solicitor had said: "File your answer, which is prepared, without prejudice to the amended interrogatories." I cannot prescribe to Plaintiff or his solicitor any other rule than that which the practice establishes. The order having been obtained, the amendments having been made according to the constant practice of the Court, there is nothing improper in the interrogatories which have

(1) 2 D. F. & J. 81. (2) 12 W. R. 285.

V.-C. B. 1871 VISCOUNT NEWRY v. EARL KILMOREY.

been filed; and although I do not wish that the Defendant should have more trouble than is necessary, yet in the matter of costs the Court will at the proper time be able to pay proper attention to any application that is made. [His Honour, after adding that he did not think there would be any difficulty in framing an answer, so as to distinguish that which had been already answered from that which Defendant was now required to answer, refused the motion with costs.]

Solicitors: Mr. *Appleyard;* Messrs. *Williams & James.*

V.-C. B. 1871 *Feb.* 9; *March* 1.

In re BRAMPTON AND LONGTOWN RAILWAY COMPANY.

Practice — Winding-up — Evidence — Companies Act, 1862 — *General Order of 11th Nov.*, 1862, *Rule* 60—*Contributory—Right of Cross-examination.*

A contributory of a company in course of winding up is entitled, under the liberty given by Rule 60 of the General Order of the 11th of Nov., 1862 (under the *Companies Act*, 1862), not only to attend the cross-examination by the official liquidator of a person claiming to be a creditor of the company, but also to cross-examine such claimant upon the matters referred to in the affidavit made in support of his claim.

MOTION on behalf of *E. Waugh, Thomas Graham,* and *John Sutton,* alleged contributories of the *Brampton and Longtown Railway Company,* that *W. H. Shaw,* who attended on the 30th of January, 1871, before the special examiner appointed by the Court, and was sworn, but demurred or objected to answer the questions then and there put to him on the part of the parties now moving, might be ordered to attend, at his own expense, before the special examiner, to be examined in this matter, and that *Shaw* might be ordered then and there to answer the questions to which he demurred or objected to answer, and might be ordered to pay the costs of and occasioned by such demurrer or objection, and the costs of this application.

An order for winding up the company was made on the 20th of December, 1869. Mr. *Shaw,* who was the solicitor employed in

carrying the bill under which the company was incorporated through Parliament, sent in a claim for his bill of costs and disbursements, and on the 23rd of April filed the usual affidavit in support of his claim. The bill of costs was referred by the Chief Clerk for taxation, and further evidence was required in respect of an item of £579.

Accordingly, on the 13th of January, 1871, *Shaw* filed a further affidavit in support of this item.

Pursuant to notice received, Mr. *Shaw* attended before the special examiner, and was cross-examined during two days on behalf of the official liquidator. On the termination of this cross-examination, counsel, instructed on behalf of the applicants having leave under the 60th Rule of the General Order of Nov., 1862, (under the *Companies Act*, 1862), to attend proceedings in the matter, claimed the right to cross-examine *Shaw* on behalf of the contributories.

Shaw declined to answer any questions put to him by counsel for the contributories, and the matter was accordingly brought before the Court upon the present motion.

Mr. *Amphlett*, Q.C., and Mr. *T. L. Wilkinson*, in support of the motion :—

Having given notice to the official liquidator, pursuant to Rule 60 of the General Order of Nov., 1862, of their intention to attend the proceedings, the applicants have a clear *locus standi* before the examiner, and are entitled, not merely to watch, but to take part in the proceedings, and, if they think fit, to cross-examine the witness. In *Attorney-General* v. *Shore* (1) liberty was given to persons who were not parties to a charity suit to intervene in the proceedings before the Master, as the position of the relators rendered them incapable of adequately representing and protecting the interests of all persons interested. So here the question is not so much between the official liquidator and the creditor as between the creditor and the contributories, as if the claim is established it will fall upon the contributories, and therefore they ought not to be deprived of the right to cross-examine the creditor. By Rule 60 we are placed in the same position, and

(1) 1 My. & Cr. 394.

V.-C. B. 1871 — *In re* Brampton and Longtown Railway Co.

have the same rights, as persons served with notice of decree under Rule 8 of 15 & 16 Vict. c. 86, s. 42, who are bound by the proceedings in the same manner as if they had been originally made parties to the suit, and may, by an order of course, have liberty to attend the proceedings under the decree.

Mr. *Kay*, Q.C., and Mr. *Smart*, for Mr. *Shaw*:—

No case has been cited in support of the right claimed by these contributories, of attending before the examiner during the examination, and of their own free will putting what questions they please to the witness in cross-examination; and the inconvenience of such a course is alone a sufficient answer to this motion. There will be no limit to an examination if every contributory is to be allowed, on a roving inquiry, to put questions in cross-examination, there being no power in the examiner to stop questions, however irrelevant. By the 74th Rule of the Order of Nov. 11, 1862, the practice in winding-up proceedings, where not specially provided by the *Companies Act*, 1862, is the same as under 15 & 16 Vict. c. 86: *In re English Joint Stock Bank* (1). Upon sect. 30 of the latter Act, giving power to Chief Clerks to issue advertisements, to summon parties and witnesses, to administer oaths, and to examine parties and witnesses as the Judge shall direct, it has been held that the person to be examined is entitled to notice of the points on which he is to be examined: *Wormsley* v. *Sturt* (2); *In re Lord's Estate* (3). So, in this case, the contributories should have given notice of their wish to cross-examine, stating the points to which such cross-examination would be directed, and then obtained the consent of the liquidator for that purpose.

Mr. *Amphlett*, in reply:—

The question is simply whether contributories, having a right given to them by Rule 60 of attending an examination of which notice has been given by the liquidator, can themselves cross-examine the witness. If not, the right given by Rule 60 is perfectly useless.

(1) Law Rep. 3 Eq. 203. (2) 22 Beav. 398.
(3) Law Rep. 2 Eq. 605.

SIR JAMES BACON, V.C.:—

V.-C. B.
1871
In re BRAMPTON AND LONGTOWN RAILWAY CO.

This case seems to me to be one of great importance as regards the practice of the Court, but of still greater importance on much higher considerations. The case stands thus: Mr. *Shaw* claims to be a creditor of the company, and his claim, if established, will have to be paid by the parties now moving. It would seem in the highest degree unreasonable that the party against whom a pecuniary demand is made should have no opportunity of cross-examining the man who makes the claim against him upon the subject of that claim. In an action at common law the party seeking to prove his claim or set-off would be subject to cross-examination by the opposite party; and here, in my opinion, under the very terms of the rule, there is a clear right to cross-examine, but limited to the subject of the affidavit. The affidavit, I assume, does not travel out of the facts necessary to establish the claim. If, as was suggested, there was any danger of questions being put under cover of cross-examination upon this claim, so as to extort evidence that would enable the applicants to dispute their liability to be placed on the list of contributories, that would be a thing to be wholly discountenanced as against the practice of the Court. Having under the rule the right to attend the proceedings, they have, as I read it, equal rights with those which a party to a suit would have, and those rights would include the right to cross-examine. Then it is objected that if the number of contributories were large, there might be an almost infinite number of examinations. But if the contributory has the right, I cannot deprive him of it; nor am I much moved by that objection, as it is not likely that people would abuse the right which they possess under the statute for the purpose of cross-examining over and over again upon matters already proved. What, then, is there in the practice or the rules which prohibits the statutory right claimed by the contributories? In the case of *In re Lord's Estate* (1), the Master of the Rolls, looking at the policy of the Act (15 & 16 Vict. c. 86, s. 40), may have thought it quite right that the particular objects of the examination should be specified. Here they are specified by force of the affidavit itself, and there can be no cross-examination except on matters contained in the affidavit. I am of opinion

(1) Law Rep. 2 Eq. 605.

V.-C. B. 1871 *In re* Brampton and Longtown Railway Co.

that this gentleman is liable to be cross-examined upon his affidavit in order that the parties who have to pay, if his claim be right, may know from him the true grounds on which he claims, and on what grounds the claim can be disputed.

The notice of motion is, in its terms, much too large; it asks that *Shaw* may be ordered to attend at his own expense—that, I think, is right; then that he may then and there answer the questions to which he demurred or objected to answer—that I do not think ought to be any part of the order; and that he may be ordered to pay the costs caused by the delay and the costs of this application. I do not think he ought to pay those costs. The question is, as far as I know, a new one. The objection has proceeded upon a mistake; and I think I do enough in ordering Mr. *Shaw* to attend, at his own expense, to be cross-examined upon his affidavit at the instance of the party now moving. Costs of the examination and of this motion reserved.

March 1. In consequence of a difficulty that had occurred in drawing up the order, the matter was again placed in the paper to be spoken to, and the order was in the following terms:—

Order that the said *W. H. Shaw*, of, ———— do, at such time and place as *T. F. M.*, the examiner appointed in these matters pursuant to the order, dated the 13th of January, 1871, shall appoint, attend at his own expense and be sworn and cross-examined on his affidavit filed in these matters on the 13th day of January, 1871, such cross-examination to be limited to the matters referred to in such affidavit; and that the costs of the said *Edward Waugh*, *Thomas Graham*, and *John Sutton*, of this motion and such cross-examination be respectively reserved.

Solicitors: Messrs. *Flux & Leadbitter;* Messrs. *C. & H. Tahourdin.*

POTTS *v.* BRITTON.

M. R.
1871
Feb. 11, 15.

Power—Power to appoint by Will—Forfeiture of Power—Will previously executed.

Under a settlement a fund was held upon trust for such persons as *G.* and *B.* should jointly appoint, and subject thereto upon trust for *G.* for life, with remainder to *B.* for life, subject to determination as thereinafter mentioned, with remainder to such of a certain class as *B.* should by deed or will appoint: and it was provided that if *B.* should commit any of certain acts, his life estate should be determined and the trust fund should go as if *B.* were actually dead, and all the powers therein contained should thenceforth be exercised as if he were then dead, without prejudice to his right to exercise jointly with *G.*, either before or after the determination of the trust in his favour, the joint power reserved to them. *B.* committed an act of forfeiture, and afterwards died:—

Held, that the sole power of appointment reserved to him was not effectually exercised by a will made prior to the forfeiture.

By an indenture dated the 10th of February, 1862, certain property was settled upon trust for sale, after the decease of *George Potts*, or in his lifetime with his consent, and for application of the proceeds in payment of certain incumbrances, and subject thereto upon trust for such persons and purposes as *George Potts* and *George Edward Bayly Potts* (a son of *George Potts*, and hereinafter called *Bayly Potts* simply) should appoint; and in default of and until such appointment, upon trust for *George Potts* during his life, and after his decease upon trusts for the benefit of *Bayly Potts* and his wife and issue during his life, subject to such proviso for determining such life interest as thereinafter contained; and "from and after the determination of the trusts" thereinbefore declared in favour of *George Potts* and *Bayly Potts*, upon trust for such of the issue of *Bayly Potts* as he should by deed or will appoint, and in default of or subject to any such appointment, for his children in manner therein mentioned; and in case there should be no child of his, then upon trust that the trustees should, after the decease of *George Potts*, and upon the failure or determination of the trusts aforesaid, or in his lifetime (if the prior trusts in favour of such other parties as aforesaid should so determine in his lifetime), levy and raise a sum of £5790, together with interest, and pay the same to *George Potts*, his executors, administrators, and assigns, and should

M. R. 1871 POTTS v. BRITTON.

stand possessed of the residue of the trust funds, upon trust for such of the children, grandchildren, or more remote issue of *George Potts* (other than *Bayly Potts* and his issue) or of *James Reed*, as *Bayly Potts* should by deed or will appoint; and in default of such appointment, upon the trusts therein mentioned. Then followed these clauses: "Provided always, nevertheless, and it is hereby expressly agreed and declared between and by the said parties hereto, that if the said *George Edward Bayly Potts* shall at any time become bankrupt, or shall sell, assign, charge, or otherwise anticipate the dividends, interest, and annual income of the said trust fund and premises so made payable to him, or for the benefit of himself or of any wife with whom he may have intermarried, or of any of his children or issue during his life (after the decease or subject to the life interest therein of his said father), or his interest therein or in any part thereof, or if the same dividends, interest, and annual income, or any part, shall in any other manner, either by his act or by operation of law or otherwise howsoever (otherwise than and except by the exercise of any of the powers or authorities hereby expressly limited to him jointly with his said father or solely) cease to be applicable to or upon the trusts hereinbefore declared and directed to take effect during his life or to or upon any of such trusts (after the decease or subject to the said life interest therein of his said father as aforesaid), then and in either of such cases, and from thenceforth, the trusts hereinbefore directed for the payment of such dividends, interest, and income in manner aforesaid during his life, after the decease of his said father shall cease, determine, and be absolutely void; and from thenceforth the said trust premises, and the dividends, interest, and annual income thereof shall (subject and without prejudice to the trust in favour of his said father) go and be held, applied, and disposed of in such and the same manner in all respects as under the trusts and provisions aforesaid the same would have gone, been applied and disposed of in case he, the said *George Edward Bayly Potts*, were then actually dead, and all and every the powers of appointment, advancement, consent, and direction, and other powers herein contained shall thenceforth be exercised as if he were then dead, but without prejudice to his right to exercise jointly with his said father (either before or after such determination of the said trust in his favour) the said joint

power of appointment hereinbefore given or reserved to them over the said trust fund and premises: provided always, and it is hereby agreed and declared, that it shall and may be lawful for the said *George Edward Bayly Potts*, either in immediate contemplation of or at any time or times subsequently to any marriage he may contract, by any deed or deeds, with or without power of revocation and new appointment, or by his will or any codicil or codicils thereto to be by him respectively duly executed prior to the determination of the trust hereby declared in his favour as aforesaid, to give limit or appoint unto or for the benefit of any wife with whom he may intermarry, and who shall survive him, or the determination of the trusts hereinbefore declared in his favour as aforesaid, either for her life or for any less interest, to take effect after his decease, or the determination of such trusts as aforesaid (subject to the said life interest of the said *George Potts*), any part of the annual income of the said fund and premises, the income whereof is hereinbefore limited to him for his life, determinable as aforesaid (subject to the life interest therein of the said *George Potts*), provided such interest be limited to such wife for her sole and separate use and benefit, independently of any husband, and so as not to be subject to his debts, control, contracts, or engagements, and be made determinable on her ceasing, either by her own act or by operation of law, to be entitled to the personal receipt thereof."

Bayly Potts survived *George Potts*, and died on the 29th of June, 1869, without issue. He had made a will, dated the 26th of July, 1864, by which he purported to exercise the power of appointment in favour of the issue of *George Potts* or *James Reed* by the settlement reserved to him.

On the 29th of July, 1865, *Bayly Potts* committed an act by which his life interest under the settlement was determined.

The trusts of the settlement were being administered in Court, and a Petition was now presented for distribution of the trust fund. The question was, whether the will of *Bayly Potts* was a good exercise of the power of appointment.

Mr. *Southgate*, Q.C., and Mr. *Maclaren*, for the Petitioners, who claimed in default of appointment:—

Although the will was made previously to the determination

M. R. 1871 ~~ POTTS v. BRITTON.

of *Bayly Potts'* life interest, it did not come into operation until afterwards, and therefore cannot operate as an execution of the power: *Cooper* v. *Martin* (1).

[They also referred to *Jenney* v. *Andrews* (2).]

Sir *R. Baggallay*, Q.C., and Mr. *F. H. Colt*, for Respondents in the same interest.

Mr. *Jessel*, Q.C., and Mr. *Everitt*, for parties claiming under the will:—

The manifest intention of the parties to the settlement was, that a will made by *Bayly Potts*, before forfeiture of his life interest, should take effect although he died after having forfeited such interest. It is clear that persons may enter into a contract to that effect; and although, under these circumstances, the instrument by which the power is executed is not strictly a will, according to the legal definition, it is an instrument in the nature of a will, and popularly would be termed such.

Mr. *Fischer*, Mr. *E. Ford*, Mr. *Streeten*, and Mr. *F. C. Armstrong*, for other parties.

Feb. 15. LORD ROMILLY, M.R.:—

The question on this Petition is, whether, under a proviso in a deed of the 10th of February, 1862, *Bayly Potts* had, before his will took effect, forfeited his life estate, and with it the power of appointment vested in him by the deed. He appointed the property by will in favour of *William Reed*, and subsequently assigned his property in such a manner so as to create a forfeiture under the deed of the 10th of February, 1862, and he died on the 29th of June, 1869.

The Petitioner contends that, as the appointment by will did not come into operation until the death of *Bayly Potts*, and was necessarily ambulatory and revocable up to that period, it was destroyed by the assignment of his interest under the proviso in the deed in question. For this purpose *Cooper* v. *Martin* is cited, as governing the case. The Respondents contend that, by the

(1) Law Rep. 3 Ch. 47. (2) 6 Madd. 264.

terms of the deed itself, *Cooper* v. *Martin* (1) does not apply, but that the parties to the deed intended, and clearly expressed their intention to be, that a previous appointment by will, that is, by a will bearing date before the forfeiture, should take effect, notwithstanding the subsequent forfeiture and the still more subsequent death of the testator. Unless the terms of the deed expressly specify this, the rule of law, as expressed in *Cooper* v. *Martin*, must govern the question.

It is therefore necessary to look through the deed and see what it provides:—[His Lordship then stated the effect of the deed as above, and read the clause relating to the forfeiture of *Bayly Potts'* life interest.] I stop there for a moment, and I think that up to this point it appears pretty clear that every power of every sort, except the power to be exercised jointly with his father, is taken away from *Bayly Potts*. However, that is disputed by the Respondents; but, before noticing their arguments, I think it desirable to state the next proviso, which is very much relied upon by the Respondents. The proviso is for the purpose of enabling *Bayly Potts* to make a provision for a wife, and it is as follows:—[His Lordship read it.] This proviso is much relied upon by the Respondents, as throwing a light upon the previous one. It is contended that this proviso has reference to a will executed before the determination of the trust, and this must mean a will executed before the forfeiture. The words are, "by any deed or deeds, with or without power of revocation, or by his will or any codicil or codicils thereto to be executed prior to the determination of the trusts." I am of opinion that this is not the correct view of the proviso, which is to be explained *reddendo singula singulis*. There are two modes by which the trust may be determined. One is by forfeiture, and the other is by the death of *Bayly Potts*. He may make a valid appointment by deed before the trusts are determined by forfeiture, and he may make a valid appointment by will before the determination of the trusts by death; but he cannot make a valid appointment by will, *i. e.*, an appointment which will be irrevocable before the determination of the trusts by forfeiture. To do this the whole character of the instrument *qua* will must be altered, which is impossible.

(1) Law Rep. 3 Ch. 47.

M R. 1871 POTTS v. BRITTON.

In this, as it appears to me, lies the fallacy of the whole argument addressed to me. It takes the words, "as if actually dead," as if they made the will irrevocable, and as if the appointment by it then came into actual operation at that time. But this is impossible. They cannot make the will irrevocable. They cannot, in order to accomplish this object, turn the word "will" in the deed of 1862 into these words, viz., into "an instrument in writing," and so make it incapable of subsequent alteration. The argument of the Respondents is, that the will, although it is ambulatory and capable of revocation and alteration at his pleasure until the forfeiture, ceases to be so the moment the forfeiture takes effect; and that thereupon the forfeiture operates upon the provisions contained in the will not then proved or in operation, and it makes these provisions irrevocable. I wholly dissent from such a view of the case, and from this construction of the deed, which has, in my opinion, no foundation in law or in reason. It is argued that persons by agreement in a deed may produce this result, but in my opinion they can only do what is possible in the nature of things. They cannot by agreement give this power to a deed which creates a forfeiture, that it is to convert a then existing will remaining in the possession of the testator into an irrevocable instrument, that is, into something which is not a will. It is asked, suppose the wife survived the husband, and that he had made a previous appointment by will in her favour, would not that operate in her favour, notwithstanding the proviso for forfeiture? I am of opinion that it would not, and that this is in truth only another mode of putting the same question. I am of opinion that the case is governed by *Cooper* v. *Martin* (1), that the will does not operate as an execution of the power until it comes into operation, that it does not come into operation until the death of the testator, and that no agreement between the parties can make such a will an irrevocable instrument, or invest it with that character, by reason of a subsequent forfeiture of the life estate.

Solicitors: Mr. *G. R. Dodd;* Messrs. *Pattison, Wigg, & Co.*

(1) Law Rep. 3 Ch. 47.

ZAMBACO *v.* CASSAVETTI.

M. R.
1871
Feb. 23, 24.

Practice—Suits for similar Objects—Decree—Breach of Trust—Ordinary Decree for Administration — Infant's Settlement — Confirmation — Investment — Discretionary Power.

A Plaintiff who files a bill for the administration of a testator's estate, charging the trustees and executors with breaches of trust, may bring his suit to a hearing notwithstanding that the ordinary administration decree has been obtained in a suit subsequently instituted, to which the Plaintiff is not a party. If a second decree is made, both decrees ought to be prosecuted in the same branch of the Court. Where a first suit is stayed by reason of a decree in a second suit, the Plaintiff in the first suit will ordinarily have the carriage of the decree.

A settlement made with the sanction of the Court, on the marriage of an infant, of certain funds alleged to represent the infant's share under a will, does not operate as a confirmation of prior dealings by the trustees of the will, so as to preclude the *cestuis que trust* under the settlement from filing a bill charging the trustees under the will with breaches of trust.

Whether a power to *A.* and *B.*, or other the trustees of a will for the time being, to make such investments of the funds subject thereto, as they may in their discretion think fit, authorizes the survivor of *A.* and *B.* to invest in foreign securities, *quære.*

DEMETRIUS GIOVANNI CASSAVETTI, by his will, dated the 26th of July, 1858, after making specific bequests to his wife, *Euphrosyne Cassavetti*, and after directing his said wife and his brother *Alexander Giovanni Cassavetti*, out of his estate, in such manner as they should think fit, to raise the sum of £10,000 to be applied for philanthropic purposes, directed that his said wife and brother, or other the trustees for the time being of his will, should, from and out of his moiety of the business carried on by himself and his said brother, in such manner as they should deem most proper, realise the sum of £60,000, that is to say, £40,000 within one year from his death, and £20,000 within two years from that period, and should invest the same, when realised, in such manner as to securities and otherwise as they should in their discretion think fit; and he empowered his said wife and brother to carry on the said business for such time as they should think fit; and as to all his real estate, and the said sum of £60,000, and his moiety of the said business (subject as aforesaid), and as to all the residue of

M. R. 1871 ZAMBACO v. CASSAVETTI.

his personal estate, the testator devised and bequeathed the same, subject to the payment of his debts and funeral and testamentary expenses, to his said wife and brother upon trust, as to one-third thereof, in manner therein mentioned; and as to the remaining two-thirds thereof, upon trust for his son *Alexander Cassavetti* at twenty-one, and his daughter *Mary Terpsithea Cassavetti* at twenty-one or marriage, with benefit of survivorship, as therein mentioned. And the testator declared that his said wife and his said brother, or other the trustees for the time being, might, at their discretion, sell all his real and personal estate upon such terms and at such times as they should think fit; and that the moneys to be received from any such sale or sales should be invested or applied on security or otherwise in such way as his said wife and her said brother, or other the trustees for the time being, might in their absolute discretion think fit. The will contained a power for the appointment of new trustees; and *Euphrosyne Cassavetti* and *Alexander Giovanni Cassavetti* were appointed executors.

The testator died on the 7th of August, 1858, leaving his widow and the two children named in the will, both infants, him surviving.

In 1861 a marriage was in contemplation between *Mary Terpsithea Cassavetti* (then an infant of eighteen or thereabouts) and *Demetrius Zambaco;* and with a view to obtaining the sanction of the Court to a settlement of Miss *Cassavetti's* fortune, a bill was filed in her name against her uncle and mother, the trustees of her father's will. The bill prayed that the trusts of the will might be administered, and the rights and interests of the Plaintiff might be secured for her benefit.

A settlement, dated the 6th of July, 1861, to which *Demetrius Zambaco, Mary Terpsithea Cassavetti, Euphrosyne Cassavetti,* and *Alexander Giovanni Cassavetti* were parties, was prepared and settled pursuant to an order made in the suit. It contained recitals to the effect that all the debts and funeral and testamentary expenses of the testator had been paid, and his co-partnership business had been wound up; that all his real estate within the *United Kingdom* had been sold, as also certain real estate in *Egypt,* but that part of the proceeds of the real estate in *Egypt* had not been as yet received, and that some debts due to the testator's estate had not been recovered; and that the sum

of £60,000, mentioned in the will, had been raised, and had been, with the residue of the net proceeds of the testator's estate already realised (amounting to £121,321 14*s.* 8*d.*), invested in the names of *Euphrosyne Cassavetti* and *Alexander Giovanni Cassavetti* as follows: £49,642 19*s.* 8*d.* in certain foreign stocks and securities; £72,328 15*s.* in the purchase of £78,000 New 3 per Cents.; and £2350 in the purchase of a leasehold house. By it *Mary Terpsithea Cassavetti* (with the sanction of the Court) and *Demetrius Zambaco* assigned the third part, to which *Mary Terpsithea Cassavetti* was under the will of her father entitled in expectancy on attaining twenty-one or marrying, of and in the said sum of £121,321 14*s.* 8*d.* so realised as aforesaid, to trustees upon trust, from and after the solemnization of the marriage between her and *Demetrius Zambaco,* for the benefit of herself and the children of the marriage, with power for her to appoint part of the income of the property, not exceeding half, to be paid after her death to *Demetrius Zambaco* during his life. There was a covenant for the settlement upon the like trusts of all the real and personal estate to which *Mary Terpsithea Cassavetti,* or *Demetrius Zambaco* in her right, should, upon the solemnization of the marriage between them, or at any time or times afterwards during the coverture, be or become absolutely entitled in possession or reversion, subject, however, to certain specified exceptions, but including in such covenant the share of *Mary Terpsithea Zambaco* in the proceeds of the sale of the Egyptian real estate, and the unrecovered debts due to the testator's estate, and also any share in the real or personal estate of the testator to which she might become entitled by the death of her brother *Alexander Cassavetti* under twenty-one.

The marriage took place on the 20th of July, 1861, and there had been issue of it two children, *Demetrius François Zambaco* and *Marie Euphrosyne Zambaco.* After the sanction of the Court had been obtained to the settlement of the 16th of July, 1861, no further steps were taken in the said suit.

On the 17th of August, 1862, *Alexander Giovanni Cassavetti* died. No trustee of the testator's will had been appointed in his place.

In November, 1868, the present suit was instituted by *Demetrius*

M. R. 1871 ZAMBACO v. CASSAVETTI.

Zambaco and his two infant children as Plaintiffs against *Euphrosyne Cassavetti*, the representatives of *Alexander Giovanni Cassavetti*, the trustees of the settlement of July, 1861, *Mary Terpsithea Zambaco* (the wife of *Demetrius Zambaco*), and *Alexander Cassavetti*, the son of the testator. The bill charged that *Euphrosyne Cassavetti* and *Alexander Giovanni Cassavetti* jointly, during the life of the latter, and *Euphrosyne Cassavetti* alone since his death, had been guilty of divers breaches of trust, and particularly had improperly retained certain funds to which the testator was entitled at the time of his death in their then state of investment in foreign securities, and had also invested moneys coming to their or her hands in improper securities; and it prayed for administration of the testator's estate, and for relief in respect of the breaches of trust.

In March, 1869, a suit was instituted by *Alexander Cassavetti* against *Euphrosyne Cassavetti* and the representatives of *Alexander Giovanni Cassavetti*, for the administration of the testator's estate. The bill in the last-mentioned suit contained no averments as to breaches of trust, and the ordinary administration decree was made therein by consent on the 24th of April, 1869.

The present suit now came on to be heard, and the Plaintiffs proposed to take a decree for administration, with special inquiries as to the non-conversion of the foreign securities to which the testator was entitled at the time of his death, and as to subsequent investments in foreign securities.

Mr. *Jessel*, Q.C., and Mr. *Chapman Barber*, for the Plaintiffs.

Sir *R. Baggallay*, Q.C., and Mr. *Marten*, for *Euphrosyne Cassavetti*:—

We say that it is both improper and unnecessary to bring this suit to a hearing.

In the first place, *Demetrius Zambaco* has no interest whatever in the testator's estate, and therefore is improperly made a Plaintiff.

As regards the non-conversion of foreign securities to which the testator was entitled at the time of his death, the trustees of his will had an absolute discretion as to investments, with which

the Court will not interfere: *In re Sewell's Estate* (1). Besides, the two infant Plaintiffs, who alone can complain, claim exclusively under the settlement of July, 1861, which is an absolute adoption of everything done by the trustees up to that time.

As to the subsequent investments in foreign securities, that was done in the exercise of the discretion of the trustees, and the Court will not interfere. That discretion was annexed to the office of trustee, and so capable of being exercised by *Euphrosyne Cassavetti* after the death of the co-trustee: *Lewin* on Trusts (2). Besides, any relief to which the Plaintiffs are entitled in this respect, might have been obtained in the suit of *Cassavetti* v. *Cassavetti*, in which a decree has already been made; or, if not, relief can only be given upon a supplemental bill, in the nature of a bill of review; and such a bill could only be filed with the leave of the Court, and after a specific breach of trust has been proved: *Partington* v. *Reynolds* (3); *Massey* v. *Massey* (4).

Mr. *Wickens*, and Mr. *Rodwell*, for the other Defendants.

LORD ROMILLY, M.R.:—

I think the decree in this case is a matter of course, and I have been exceedingly surprised at the argument on behalf of the Defendants, which seems to set at nought the practice which has obtained in this Court ever since I sat here.

A person who, as I shall for the present assume, has a right to file a bill, files a bill on the 16th of November, 1868; and thereupon, persons interested in the subject-matter of that suit, and not liking that suit, file a bill in the month of March following, for the purpose of preventing the Plaintiff from obtaining a decree in the first suit. Now the two suits are either the same or they are not. In the first place, assume that they are the same. Then the invariable practice of this Court has been to do this—to say, "One decree shall be made in both suits;" or if a decree has been already obtained, "We will stop the first suit if you have got the decree in the second suit first; and we will give the conduct of that decree to the person who first filed the bill." That is the practice

(1) Law Rep. 11 Eq. 80.
(2) 5th Ed. p. 437.
(3) 4 Drew. 253.
(4) 2 J. & H. 728.

M. R. 1871 ZAMBACO v. CASSAVETTI.

that, in the absence of special circumstances, I have invariably followed, and it is usual for the person who has obtained the decree in the second suit to apply by motion (informing the Plaintiffs in the first suit that a decree has been obtained), for the purpose of stopping further proceedings in the suit which was first instituted. Now, not only is that the practice, but it is of frequent occurrence.

Now suppose the suits are not for exactly the same purpose. Then, when the application is made for the purpose of stopping the proceedings in the first suit, the Plaintiffs in that suit say: "The decree that you have obtained will not do; our suit must come to a hearing, because it is for a different purpose, and it is a purpose which must be accomplished." Thereupon the Court, if it is of that opinion, allows the cause to proceed, and it comes on to be heard. Then if the two suits are in a great measure connected together, what the Court does is to direct that the second decree which is made in the suit so allowed to proceed to a hearing, and which is in truth the first suit instituted, shall be prosecuted before the same Judge, and in the same Chambers, and before the same Chief Clerk, in which the former decree is prosecuted, in order to avoid all expenses that might possibly be incurred by having two suits. That is the regular practice.

It is the duty of the person who has got the decree to stop the first suit, if it is a suit that can properly be stopped, and to apply to the Court for that purpose. In this case the Plaintiff in the second suit has not so applied, for a very plain reason, because he could not have stopped it. That is quite obvious, and accordingly this suit has come to a hearing; and then the only question is, whether these inquiries are fit and proper.

Now, with respect to the father, I confess I do not see what his interest was in the suit. I have not heard a reply upon that subject, because Sir *R. Baggallay* informed me he did not intend to press it, and I think very wisely, as I am clearly of opinion that his children were entitled to be Plaintiffs; and it merely comes to this, that their father might have been their next friend instead of being himself the Plaintiff, and in either case he would be responsible for costs. It seems to be very natural (it being unquestionably his suit—that is admitted by everybody) that he

should institute a suit for the purpose of ascertaining what are the contingent shares of his children, and of having those shares secured for their benefit in case they should attain the age when the contingency becomes vested in them, and the interest of the children becomes absolute.

Now, in the course of the argument, doctrines have been brought forward which, if I understand them fully, amount to this, viz., that if a trustee commits a breach of trust, sells out consols and invests the proceeds, for instance in Pennsylvanian Bonds or things of that sort, which may have been repudiated by the State, and if these bonds are made the subject of a settlement by the Court of Chancery, the persons who are the *cestuis que trust* under that settlement cannot afterwards complain of the breach of trust of the trustees in converting the consols into Pennsylvanian Bonds. All I can say is, that if that were the law, I should in every settlement I make in Chambers insert a proviso to this effect—"Provided that nothing herein contained shall prejudice or affect the right of any person who claims an interest under this settlement, or any child hereafter to be born, to contest the propriety of any acts by which the trustees have converted any original funds into the funds which form the foundation of this settlement." But I am of opinion that such is not the law.

On the question whether the trustees had full and perfect discretion to buy these stocks, I do not intend to express any opinion at all. If I were inclined to express any opinion, I should be disposed to think that the testator did intend to give them a very full discretion upon the matter. But in saying this I do not at all assent to Mr. *Marten's* argument, which was, that a discretion vested in two particular trustees is a power annexed to the trust, which cannot be separated from it, and that therefore it applies to a single trustee, although the testator has expressly stated that it is to be confined to two particular persons. The discretion given to two particular persons no doubt belongs to them so long as they continue to be trustees, but if it is confined to them, and if they cease to be trustees, it is not continued to their successors, who merely perform those duties which are essential for carrying into effect the uses and benefits which are given under the trusts of the instruments, and the discretion itself is actually gone, unless the

M. R. 1871 ZAMBACO v. CASSAVETTI.

testator, or the person who has created the trust, thinks fit to confirm it to the successors.

Therefore I shall make a decree as asked by the Plaintiffs; but if, as I understand, the suit of *Cassavetti* v. *Cassavetti*, in which a decree has already been made, is being prosecuted in another branch of the Court, the Plaintiffs in this suit must, at my request, make the proper application for the transfer of both causes to the same branch of the Court, so that both decrees may be prosecuted together.

Solicitors: Mr. *Shoubridge*; Messrs. *Thomas & Hollams*.

M. R. 1871 *March* 3.

COCKS *v.* CHANDLER.

Injunction—Trade-mark—Use of the words "The original."

The original inventor of a new manufacture, and persons claiming under him, are alone entitled to designate such manufacture as "the original;" and if he or they have been in the habit of so designating their manufacture, an injunction will be granted to restrain another manufacturer from applying the designation to his goods.

THE bill in this suit was filed by the successor in business of the original inventor of "*Reading* sauce," and prayed that the Defendant (who was also a manufacturer of *Reading* sauce) might be restrained from passing off upon any person or persons whomsoever his sauce as "The Original *Reading* Sauce," or by any similar or equivalent designation.

It appeared that the sauce in question was invented many years ago by *James Cocks* of *Reading*, and named by him "*Reading* sauce," and under that name acquired a considerable reputation. The success of the manufacture induced other persons to make and sell what they called "*Reading* sauce;" and in order to distinguish the article manufactured by *James Cocks* and his successors in business, he and they had for many years (but for how long did not appear) been in the habit of wrapping the bottles of sauce sold by them in wrappers, upon which was printed a label, the form of which was varied from time to time, but in which the sauce was

always designated as "The Original *Reading* Sauce." The label in use at the time of the filing of the bill was printed in red ink, and was surmounted by the arms of the borough of *Reading*, with royal supporters; having across them the words "*Charles Cocks*" on a white label; and underneath was the following legend:—

The Original
Reading Sauce,
Prepared only by
Charles Cocks,
The sole Proprietor and Manufacturer,
No. 6, *Duke Street, Reading.*

The Defendant used a wrapper having on it a label surmounted by the royal arms, and underneath the following inscription:—

The Original *Reading* Sauce,
Prepared by
Christopher Chandler & Co.,
At their Export and Italian Warehouse,
1, *Church Street, Bermondsey,*
London.

It was admitted by the Plaintiff that the only thing to which objection could be taken was the use of the words "The original" on the Defendant's wrappers; the labels thereon being in all other respects distinguishable from the Plaintiff's, and those used on the bottles being entirely unobjectionable.

The Defendant, by his answer, alleged that the sauce manufactured by him was made from an original recipe to which the Plaintiff had no title, and submitted that his sauce deserved the title of original as much as that of the Plaintiff; and he further alleged that the Plaintiff's sauce was known to the trade and the public as "*Cocks' Reading* sauce," and not as the "original *Reading* sauce." Evidence in support of the last-mentioned allegations was given on his behalf; while, on behalf of the Plaintiff, two of the partners in the firm of *Crosse & Blackwell*, sauce and pickle manufacturers in *London*, deposed that the use of the word "original" as part of the title or description of a sauce such as *Reading* sauce, was generally understood to indicate that the sauce so described was the manufacture of the person who first introduced it to the

M. R. 1871 COCKS v. CHANDLER.

notice of the public, or of those claiming under him, and as applied to *Reading* sauce would lead those in the trade and the public to conclude that the sauce so described was the manufacture of *James Cocks* or his successors. There was no evidence that any one had been misled by the use of the words in question on the Defendant's wrappers.

The Defendant admitted that, with the exception of one *Richard Millar* of *Spitalfields*, no person other than himself and the Plaintiff and the Plaintiff's predecessors had ever made or sold sauce under the name of "The Original *Reading* Sauce." As to *Richard Millar*, it was shewn that, previously to 1864, he had used labels containing the words in question; but he appeared to have carried on business only in a small way, and had since died, and the Plaintiff alleged that he had never heard of him.

A motion for an injunction was made, and the Defendant gave an undertaking not to use the words complained of until the hearing of the cause.

The cause now came on to be heard.

Mr. *Roxburgh*, Q.C., and Mr. *A. E. Miller*, for the Plaintiff:—

We say that the Plaintiff is exclusively entitled to the use of the words "The original" on two grounds: first, because the Plaintiff is the successor in business of the original inventor of the sauce; secondly, because the Plaintiff has by user become entitled to the words as denoting the name of the sauce, on the principle laid down in *Braham* v. *Bustard* (1).

[They referred to an unreported case of *Lazenby* v. *White*, in which an injunction had been granted by the Master of the Rolls (whose decision was affirmed on appeal), to restrain a member of the family of *Lazenby* from selling his sauce as "The original *Lazenby's Harvey* sauce."]

Mr. *Cookson* (Mr. *Jessel*, Q.C., with him), relied on the facts that the labels of the Defendant could not be mistaken for those of the Plaintiff, and that there was no evidence of any person having been misled by the use of the words "The original."

(1) 1 H. & M. 447.

[He referred to *Browne* v. *Freeman* (1) and *Blackwell* v. *Crabb* (2).]

LORD ROMILLY, M.R.:—

It is essential, when persons in trade come into this Court, that they should remember that the administration of equity is founded on perfect truth, and that if persons attempt to mislead the public by stating that which is not true, this Court will restrain them upon a clear case being made out against them.

I do not consider this a case of spurious imitation. There may be a certain resemblance in the labels and in the wrappers; but that is not what is complained of. The complaint made by the bill is confined to the use of the word "original." I wholly disregard the evidence of a number of tradesmen who are interested in the question, who come forward and tell me what is the meaning of the word "original," because that is a question which I have already tried and determined myself in the case of *Lazenby* v. *White*, and as to which my judgment has been affirmed. Where there are a great number of persons who produce the same article, "original" means that the article so called is that made by the first inventor. That is the meaning of the word "original" which the Court of Chancery has always recognised.

It was urged before me that the word "original" is not like the word "chlorodyne," or "excelsior," or the like, and that a person cannot be enjoined from stating, "I am the original inventor of the *Reading* sauce," because, if originality consists in having invented it only the day before, anybody may be an original inventor. Now it appears in this case that the original invention of *Reading* sauce was by a person who died fifty years ago, and who gave the sauce that name. If he had thought fit to interfere when persons sold *Reading* sauce, he might probably have obtained an injunction from this Court to prevent them from selling *Reading* sauce; but, when he has acquiesced in that for a considerable length of time, and by acquiescing has barred himself from the right of stopping persons from selling *Reading* sauce, to the use of which name he probably had in the first instance acquired a right, then it became important to use the word "original" for

(1) 12 W. R. 305; 4 N. R. 476. (2) 36 L. J. (Ch.) 504.

M. R. 1871 COCKS v. CHANDLER.

the purpose of shewing that he was the first inventor; and he is fully entitled to do so. But if the person who uses the word is not the original inventor, or a person claiming under him, then the word "original" is worth nothing. It is only in the character of being the first inventor that any person is entitled to the use of that word.

In this case it is shewn that a person named *Millar* committed a gross piracy in this matter, and that it was not complained of. But does that justify another person in doing the same thing, or anything like it? If the Plaintiff had thought fit, he might have stopped *Millar* from doing what he did; but I do not think that that amounts to acquiescence which will entitle any other person to do the same.

The question then is this: There being abundant evidence to shew that there are a great number of persons who make *Reading* sauce, whether the person who is the owner of the original recipe which gave the name, and from which the article called "*Reading* sauce" acquired its character, is not entitled to say, "I hold under the original inventor, and the word 'original' means that, and nothing else."

The evidence and argument of the Defendant is to the effect that the word "original" could and would deceive nobody. All I can say is, that it would deceive me. If I, wishing to have the *Reading* sauce, which has acquired a great reputation in the market, went into a shop and asked for *Reading* sauce, and was told that there were several *Reading* sauces, I should say: "Which is the Original *Reading* Sauce?" or if there was a bottle given to me with the word "original" upon it, I should assume that to be correct, and I should not assume it to be made by anybody but the original inventor. I do not think I should be inclined to purchase a bottle with the word "original" upon it if I did not believe that the person putting that word on the label was the original inventor. It is quite true that the right to use the word "original" does not arise in the first instance. If two persons applied that word to a sauce within a few days of each other, both of them might call it original, and no doubt, if one did so a few days before the other, the word "original" would not then be of any great value. But the importance of it is, when from the repu-

tation obtained by the sauce in the market an abundance of manufacturers spring up, then the person who has become the owner of the original recipe is entitled to say he is the original inventor. The Defendant must suppose it is worth something, or why does not he abide by the undertaking he had given, instead of compelling the Plaintiff to bring the cause to a hearing?

No doubt there are persons in the trade who know the difference; who may truly give evidence that they never were or could be deceived by the word "original"; but they sell to customers who, when they buy sauce marked with the word "original," presume that they have got the original *Reading* sauce, or the original *Harvey's* sauce. When the case as to *Lazenby's Harvey* sauce was before me, I thought it a case of considerable difficulty, because the Defendant in that case was a person of the name of *Lazenby*, or at least was a person who bought the recipe from a person of the name of *Lazenby*, who was descended from the original inventor, and who declared that he had got the original recipe; but the Plaintiffs proved their title to it from the original inventor, who sold it, I think, in *Edward Street, Portman Square;* and I said in that case that the Defendant must not do anything which would make it appear as if his were the sauce made according to the recipe of the person who originally invented it and who originally gave the title to it.

That is what is been done in this case: the Defendant has called his "The Original *Reading* Sauce;" and I am of opinion that he is not entitled to use the word "original," and that the duty of this Court is to prevent him from using that word as applied to *Reading* sauce. Accordingly, I grant an injunction against the use of the word "original."

I repeat that I do not treat this as a case of imitation. I treat it simply as a device to induce the public to believe that the person who sells this sauce has the recipe from which, originally, this peculiar sauce for fish and culinary purposes was made, and which was sold originally under the name of *Reading* sauce, and has acquired such great reputation.

Solicitors: Messrs. *Courtenay & Croome*, agents for Mr. *Alexander Beale, Reading;* Messrs. *Risley & Stoker.*

M. R.

1871

Jan. 27;
March 6.

ROPER-CURZON *v.* ROPER-CURZON.

Marriage Settlement—Power of Advancement—Post-nuptial Settlement by Son of the Marriage.

A power in a marriage settlement to advance to a son of the marriage part of the trust funds for placing or establishing him in any business, profession, or employment, or otherwise for his advancement or preferment in the world:—

Held, to authorize the payment of part of the trust fund to the trustees of a post-nuptial settlement made by a son in favour of himself and his wife and the issue of their marriage, neither the son nor his wife being entitled to any property producing an immediate income, and the son being engaged in study, preparatory to entering the legal profession.

THIS was a special case.

By the settlement, dated the 7th of November, 1837, made on the occasion of the marriage of Mr. and Mrs. *Roper-Curzon*, certain personal estate was settled upon trust for Mrs. *Roper-Curzon* for her life, for her separate use, without power of anticipation, with remainder to her husband during his life if he should survive, with remainder to such of the issue of the marriage as they should jointly by deed, or as the survivor should by deed or will appoint; and in default, for such the children of the marriage as, being sons, should attain twenty-one, or, being daughters, should attain that age or marry; and if more than one, in equal shares. The settlement contained a power for the trustees, after the death of the survivor of Mr. and Mrs. *Roper-Curzon*, or in the lifetime of both with their previous consent, or in the lifetime of the survivor with his or her previous consent, to advance to or for each or any of the sons of the marriage any part, not exceeding one-half of his expectant share of and in the trust funds, for placing or establishing him in any business, profession, or employment, or otherwise for the advancement or preferment in the world of the same son or sons, and that the money to be so advanced to or for each of the same sons should be deducted and taken out of his share of the trust money, notwithstanding his death before the same should become absolutely vested in him. There was no power of advancement to daughters.

Mr. and Mrs. *Roper-Curzon* were both living, and the latter had

attained the age of fifty-seven. There had been two children of the marriage—a son, who had attained twenty-one, and a daughter, who was still an infant. In 1869 the son married; no settlement was executed on the occasion of the marriage; neither he nor his wife was entitled to any property producing an immediate income, and he was studying for the profession of the law, but could not enter on the practice of it for a year at least. The power of appointment contained in the settlement had not been exercised.

The case, as originally filed, stated that the son had applied to the trustees of the settlement to advance him part of his expectant share of the trust funds, and that Mr. and Mrs. *Roper-Curzon* were willing to consent to the advance to him of one-fourth of the trust funds upon his undertaking to execute a settlement thereof on himself and his wife and children.

The question was, whether, under the circumstances, the trustees of the settlement of the 7th of November, 1837, were authorized to advance and make over one-fourth part of the trust funds to the son.

Sir *R. Baggallay*, Q.C., and Mr. *Watson*, for Mr. and Mrs. *Roper-Curzon* and their son, submitted that the case fell within the power of advancement, and cited *Lloyd* v. *Cocker* (1); *In re Gosset's Settlement* (2); *Ricketts* v. *Loftus* (3).

Mr. *Chitty*, for the trustees and the infant daughter.

LORD ROMILLY, M.R.:—

I cannot sanction the advance as the matter now stands: you are simply going to give the son a sum of money which he may put in his pocket; but I am disposed to think that, if he executed a settlement, I might then do it.

The case was amended by stating that a settlement had been prepared and executed by the son, by which, after reciting that the son had requested the advance to be paid to the trustees thereof, it was declared that the trustees should hold all moneys or funds paid or transferred to them in respect of one-fourth part of the

(1) 27 Beav. 645. (2) 19 Beav. 529.
(3) 4 Y. & C. Ex. 519.

M. R.
1871
ROPER-CURZON
v.
ROPER-CURZON.

settlement funds upon trust for the son during his life, and afterwards for his wife for her life or until alienation; and subject thereto, upon trust for the issue of the marriage, according to appointment; and in default of appointment, for the children of the marriage in the usual way; and subject thereto, upon trust for the son.

March 6. The case having come into the paper this day,

THE MASTER OF THE ROLLS, without calling for any further argument, decided that the trustees of the settlement of November, 1837, were authorized to advance one-fourth part of the trust funds subject thereto, to the trustees of the settlement executed by the son.

Solicitors: Messrs. *Kennedy & Kempson.*

M. R.
1871
March 9, 10, 13.

BOWEN *v.* BARLOW.

Will—Construction—Devise of Freeholds—Mortgage of Term to Testator—Mortgage-money held not to pass.

The lessee for a term of years of four houses assigned the term, by way of mortgage, to the owner in fee of the immediate reversion, who afterwards devised the houses by the description of "my freehold houses," mentioning the numbers of the houses in the street where they were situated; and he was in possession as mortgagee at the time of his death:—

Held, that the mortgage debt did not pass under the devise, but formed part of the testator's personal estate.

Affirmed by L. C. 20 Sch 171

THIS was the further consideration of a suit for the administration of the estate of *James Daveron*, who, by his will, dated the 16th of May, 1861, after making certain specific and pecuniary bequests, gave all his real and personal estate, not otherwise effectually disposed of, to trustees upon the trusts thereinafter declared concerning the same respectively, and directed his trustees to call in, sell, and convert into money all his personal estate not specifically bequeathed, and to invest any moneys for

the time being subject to the trusts of his will, and not immediately payable to any person or persons, in the public funds of *Great Britain*; and he directed that his trustees should be possessed of such moneys, after payment of his funeral and testamentary expenses, upon trust to pay the income to his wife during widowhood, and after her death or marriage, to pay £2000 to his daughter *Hannah Matilda Barlow*, and the like sum to his daughter *Catherine Louisa Bowen*, and to invest the residue in equal moieties upon trusts for the benefit of his said daughters respectively and their respective issue. And he directed that his trustees should be seised of certain copyhold, freehold, and leasehold houses upon trust for *Hannah Matilda Barlow*, for her separate use during her life, and, after her decease, upon such trusts for the benefit of her issue as she should by will appoint, and, in default, for such of her children as should attain the age of twenty-one years, and the child or children of any child or children who should die under that age leaving issue, in manner therein mentioned; and in case no child of hers should attain twenty-one, or leave issue living at his or her decease, then (subject to any such appointment as aforesaid) upon trust, and with a power in favour of or for the benefit of his daughter *Catherine Louisa Bowen* and her children and issue, corresponding with the trusts therein declared concerning the same, in favour of or for the benefit of *Hannah Matilda Barlow* and her children and issue; and should be seised and possessed of certain other freehold and leasehold houses (including four houses described as "my freehold houses, Nos. 5, 6, 7, and 8, *Stock Street*") upon trust, and with powers in favour of or for the benefit, in the first instance, of his daughter *Catherine Louisa Bowen* and her children and issue, and then of his daughter *Hannah Matilda Barlow* and her children and issue, corresponding, as nearly as might be, with trusts and powers thereinbefore declared concerning the freehold, copyhold, and leasehold hereditaments thereinbefore devised and bequeathed for the benefit, in the first instance, of his said daughter *Hannah Matilda Barlow*, her children and issue, and then of his daughter *Catherine Louisa Bowen*, her children and issue.

It appeared that, on the 1st of February, 1855, the testator being the owner in fee simple of the plots of land on which the

M. R. 1871 BOWEN v. BARLOW.

houses in *Stock Street* were afterwards built, granted a building lease thereof to one *Thursby* for a term of ninety years, at a ground-rent of £16. On the following day *Thursby* assigned the term to the testator, by way of mortgage, to secure the repayment of present and future advances, with interest. The houses were afterwards erected and let at rents amounting in the whole to £75 8*s*. The testator, at the time of his death, was in receipt of the rents and profits as mortgagee; and it was alleged by the mortgagor that the amount of these was more than sufficient to keep down the interest under the mortgage. The accounts relating to the mortgage as between *Thursby* and the testator's representative were unsettled, but the right of redemption had not been lost.

The question was, whether, under the circumstances, the devise of the houses in *Stock Street* did or did not include the mortgage debt, which amounted to £500.

Mr. *Jessel*, Q.C., and Mr. *C. T. Simpson*, for Mr. and Mrs. *Bowen* and their children, contended that the testator's interest as mortgagee passed under the devise; and cited *Woodhouse* v. *Meredith* (1), *Drant* v. *Vause* (2), and *Emuss* v. *Smith* (3).

Sir *R. Baggallay*, Q.C., and Mr. *Batten*, for Mr. and Mrs. *Barlow*:—

We say that the mortgage debt did not pass under the devise, but forms part of the personal estate of the testator, who was simply mortgagee in possession. If the mortgage had been by demise or by deposit, instead of by assignment, no question could have arisen; and how can the accidental circumstance that the term is merged at law make any difference? The testator simply intended to give what was freehold, and the mortgage debt is no part of the freehold. The limitations of the devised property are quite inconsistent with an intention to pass the mortgage debt, for there is no provision as to what is to be done with the debt when received; but if the mortgage debt is treated as being part of the testator's personal estate, it will be invested in accordance with the directions he has given.

As to the cases cited on the other side, *Woodhouse* v. *Meredith*

(1) 1 Mer. 450. (2) 1 Y. & C. Ch. 580. (3) 2 De G. & Sm. 722.

simply decides that if a testator devises specifically certain houses, and describes them as freehold, and his only interest in these houses is as mortgagee, such interest will pass, because there is nothing else to which the words of the will can apply. *Drant* v. *Vause* (1) and *Emuss* v. *Smith* (2) have no application.

The cases of *Moor* v. *Raisbeck* (3) and *Elliott* v. *Fisher* (4) support our contention.

Mr. *Everitt*, for the trustees.

Mr. *Simpson*, in reply:—

The only argument on the other side is, that the mortgage debt is, or may become, personal estate; and that is answered by the cases of *Drant* v. *Vause* and *Emuss* v. *Smith*.

March 13. LORD ROMILLY, M.R.:—

The question in this cause is, what passed under a devise in these words: "I direct that my trustees shall be seised and possessed of my freehold houses, Nos. 5, 6, 7, and 8, *Stock Street*, upon trust." That is all I think it necessary to read. The interest of the testator in these four houses was this: Before February, 1855, he was owner in fee simple of four plots of land in *Stock Street*, and in February, 1855, he granted a lease of the four plots of land to a person of the name of *Thursby* for ninety years, at a ground-rent of £16 per annum; and on the next day he took an assignment of this lease to secure money already advanced, and to be advanced by him, to be laid out in building houses on these four plots. This was done; and the testator, at his death, was in possession of those four houses, the rent of which was £75 per annum, so that there had been an increase in the value of the property of £59 per annum by reason of this money having been laid out.

Now, in consequence of the lease being assigned to secure the advance, and the testator being entitled to the property in fee, the term merged at law in the reversion in fee, and therefore at law he

(1) 1 Y. & C. Ch. 580.
(2) 2 De G. & Sm. 722.
(3) 12 Sim. 123.
(4) Ibid. 505.

M. R. 1871 BOWEN v. BARLOW.

was the owner in fee simple in possession. But that was not so in equity; and, in my opinion, this case must be treated in the same manner as if there were no merger at law. If the mortgage had been made by underlease, the devise would not have passed the underlease; and although it is said, no doubt, a devise of *Whiteacre* carries all the interest which the testator has in *Whiteacre*, which in one sense is true, yet these are questions merely of intention, to be discovered from the will itself. Suppose this case were to occur: that a man, the owner of *Whiteacre*, subject to a farming lease to *A.*, lends *A.* £500 on the security of the lease by means of the deposit of the lease. The devise of *Whiteacre* would not carry the £500; and, in my opinion, it makes no difference whether this is done by an assignment or whether it is done by underlease. The intention of the parties is exactly the same, and no alteration in the intention of the testator can be presumed from the fact of his securing his debt by assignment instead of by underlease. There is a sum of £500 which he has lent upon the security of the interest which another person had in this property. That is not included in this devise. In point of fact the property, in equity, in the lease which he has granted still remains in the person to whom it was granted; it is his property, and he may redeem it at any time on paying the £500. It is not as if the testator had bought it out and out, which would have been a very different thing. If he had given a sum of money for the assignment of the lease, or taken an absolute assignment of the lease for valuable consideration, which was not to be repaid to him, that would have vested the whole in him in equity as well as at law; but this is nothing more than a security for £500 on the property of a stranger to whom the money is lent.

I do not perceive that the cases which have been cited assist the matter at all. In the case of *Woodhouse* v. *Meredith* (1) there was nothing else to which the devise could apply; the consequence of which was that it was necessarily included. The cases of *Emuss* v. *Smith* (2) and *Drant* v. *Vause* (3) were also cited to me. The case of *Drant* v. *Vause* was this: the devise was effectual, although the property had been converted into personalty by a person who had an option to convert it, and who exercised the option. Although

(1) 1 Mer. 451. (2) 2 De G. & Sm. 722.
(3) 1 Y. & C. Ch. 580.

M. R.
1871
BOWEN
v.
BARLOW.

that altered the character of the property, it did not alter the intention of the testator. I am of opinion, with regard to the devise of these four houses, that the testator's interest in the lease did not pass, except so far as regards the legal estate in the lease. That no doubt did pass; and, accordingly, if that question were to arise at law, I am of opinion it must be considered that the term has merged in the reversion so far as the legal estate is concerned. I am of opinion that the whole of the property is vested in *Catherine Louisa Bowen* and her children, subject to, and not carrying with it, the £500, which belongs to the personal estate of the testator, and of which his representatives are entitled to enforce payment.

Solicitors: Messrs. *Herbert Lloyd & Lane;* Mr. *E. H. Barlee.*

MENZIES *v.* LIGHTFOOT.

M. R.
1871
March 16, 17, 20.

Mortgagor and Mortgagee—Priority—Mortgage to secure further Advances—Charge subject to prior Security—Advances by first Mortgagee after Notice of Charge—Publican, Brewer, and Distiller—Custom of Trade.

The lessee of a public-house in *London* executed at the public-house, and at the time of entering into possession thereof, a mortgage of his lease in favour of the brewer by whom the house was supplied with beer, to secure a sum already advanced, and future advances not to exceed in the whole a given sum. At the same time and place he charged the lease, "subject to the security already given" to the brewer, with the repayment to the distiller who supplied the house with spirits of an advance made by him. The mortgage and charge were both executed in the presence of the solicitors of the brewer and distiller, and the latter there and then gave to the former a formal notice of the charge in favour of his client. Afterwards the publican became indebted to the brewer for the price of beer supplied to the house.

The lease having been sold by the brewer under a power of sale in his mortgage:—

Held, that, in the absence of any express agreement, the distiller was entitled to be repaid his advance out of the purchase-money in priority to the debt which had been incurred to the brewer subsequently to the time when notice was given to him of the distiller's charge; and that this priority was not affected by a custom of trade alleged to exist between publicans, brewers, and distillers in *London*.

BY an indenture dated the 24th of May, 1867, a leasehold public-house, called the *Five Ink Horns*, situate in *Bethnal Green*, was

M. R. 1871 MENZIES v. LIGHTFOOT.

assigned to *Walter Hall* for the then residue of a term of twenty-one years, from the 24th of June, 1864.

By another indenture, dated the same 24th of May, 1867, after reciting, amongst other things, that the Defendant *Frederic James Lightfoot* had, at the request of *Walter Hall*, agreed to lend and advance him the sum of £1250 upon having the repayment thereof secured, together with any sum or sums of money in which *Hall* might at any time thereafter become indebted to *Lightfoot*, for moneys advanced, book debts or otherwise howsoever, with interest, it was witnessed that *Hall* assigned the public-house to *Lightfoot* for the residue of the term, subject to a proviso for redemption on payment by *Hall* of the sum of £1250, "together with any such further sum or sums as aforesaid," and interest thereon. The deed contained the usual covenants for payment of £1250, further advances and interest, and also a power of sale; and it was provided that the total principal sum to be ultimately recoverable under and by virtue of the indenture should not, with the sum of £1250, exceed the sum of £1500.

By a memorandum in writing, also dated the same day, *Hall* charged the public-house, and his estate and interest therein, with payment to the Plaintiffs of the sum of £200 and interest thereon, and all other sums in which he then was or should thereafter become indebted to the Plaintiffs, "subject only to the security on the premises already given" by him to the Defendant *Lightfoot;* and he agreed, on demand, to execute a mortgage of the premises to the Plaintiffs, or to whom they might appoint, "subject as aforesaid."

The Defendant *Lightfoot* was a brewer in *London*, and supplied the public-house with malt liquor; the Plaintiffs were distillers, also in *London*, and they supplied the public-house with spirits. The 24th of May, 1867, was the day on which *Walter Hall* entered into occupation of the public-house; and the mortgage and memorandum of charge were executed there on that day, in the presence of the solicitors both of the Plaintiffs and the Defendant. Formal notice of the charge in favour of the Plaintiffs was given by the Plaintiffs' solicitor to the Defendant's solicitor at the time of the execution thereof.

On the 11th of December, 1867, the Defendant *Lightfoot* sold

the public-house under the power of sale contained in the mortgage, and claimed to retain out of the proceeds, in satisfaction of the debt thereby secured, a sum of £1419 8*s.* 9*d.* This sum included a book debt of £56 8*s.* 11*d.* in respect of supplies of beer to *Hall.* The object of the suit was to determine whether the Defendant was entitled to retain this sum of £56 8*s.* 11*d.* out of the proceeds of sale in priority to the Plaintiffs' charge of £200.

The Plaintiffs contended that the Defendant was not so entitled, inasmuch as the debt was incurred after notice of this charge had been given. The Defendant, on the other hand, insisted on his right to retain the sum in question, first, by reason of an understanding or agreement between the Plaintiffs and himself, entitling him to hold his security for further advances or supplies of goods to *Hall* in priority to the charge of the Plaintiffs, and after notice thereof—a contention which, in the opinion of the Court, was not founded in fact; and secondly, by virtue of a custom or usage in trade, which was thus alleged in the Defendant's answer: "I say that it is the invariable custom or usage in trade, in the city of *London* and county of *Middlesex,* on the change or transfer of a public-house to a new tenant, and also on the first letting of a public-house to a publican, that the publican should give to the brewers by whom the house is supplied with malt liquors a first mortgage for the amount of the loan made by such brewers to him, and to secure the book debt to become due from the said publican to the brewers, the further advances or book debt being limited to a particular sum; and that at the same time, and as part of the same transaction, the publican should give to the distillers a security on the equity of redemption for the amount of the loan (if any) made by the said distillers to the publican, and for the book debt to become due from the publican to such distillers. On all such occasions it is the custom of the distillers to serve a formal notice of their second charge on the brewers who held the first mortgage, and I believe that such formal notice is given with the view of avoiding any question that might otherwise arise between the distillers and any subsequent or other mortgagee of the equity of redemption; and I say positively that such formal notice is never given with the intention of putting a stop to further supplies of malt liquor on credit being made to the publican. On the contrary,

M. R. 1871 MENZIES v. LIGHTFOOT.

the object of the first mortgage being made to cover future book debts or advances is, that such supplies shall be made on credit."

The Plaintiffs contested the existence and validity of the alleged custom, and a great mass of evidence with reference thereto was adduced on both sides. It appeared that the memorandum of charge given to *London* distillers by publicans was in nearly all cases identical in form with that in the present case; but in one instance the charge was expressed to be "subject and without prejudice to all principal money now due from me to Messrs. ———— of ————, brewers, and interest thereon, and to such sum as I may hereafter owe them for goods sold and delivered, or otherwise, not exceeding, with the sum of £ , the sum of £ , and as security for which they now hold the deeds."

It also appeared that, where the first mortgage was made in favour of a firm which brewed porter only, there were in some instances as many as four mortgages on the public-house: the first being in favour of the porter brewers, the second in favour of the distiller, the third in favour of the ale brewer, and the fourth in favour of the foreign wine merchant.

Mr. *Jessel*, Q.C., and Mr. *Everitt*, for the Plaintiffs, relied on *Hopkinson* v. *Rolt* (1) and *Daun* v. *City of London Brewery Company* (2).

Mr. *Southgate*, Q.C., and Mr. *W. W. Karslake*, for the Defendants:—

Neither of the cases cited governs the present. In both the second mortgage was made many years subsequently to the first; here both mortgages were made simultaneously, and formed part of the same transaction. In *Hopkinson* v. *Rolt*, Lord *Chelmsford* says (3): "I admit that special circumstances may vary the rights of the parties." In *Daun* v. *City of London Brewery Company*, Vice-Chancellor *James* says (4): "One can easily understand, if the brewer and distiller are both present at the time and both take their securities at the same moment, if in the presence of the distiller the brewer takes the security to cover further advances, a very different consideration—at all events a moral, if not a legal or

(1) 9 H. L. C. 514.
(2) Law Rep. 8 Eq. 155.
(3) 9 H. L. C. 554.
(4) Law Rep. 8 Eq. 163.

an equitable consideration—would arise to prevent the distiller from afterwards questioning the validity of such security as to future advances." These observations apply to the present case. The theory of these two decisions is this, that if a mortgagor sells his equity of redemption, and the purchaser gives notice to the mortgagee, and the latter then sells the property, it would be a fraud on the purchaser to allow the mortgagee to retain out of the purchase-money any greater sum than was due to him at the time of the notice: and a second mortgagee is a purchaser *pro tanto: Shaw* v. *Neale* (1). That theory applies here in favour of the first mortgagee. It would be a fraud on the first mortgagee to allow the second mortgagee to set up his advance in priority to sums due to the first mortgagee for beer supplied to the public-house, a supply which is essential to the carrying on of the publican's trade; for it is plain, upon the evidence, that a public-house in which no beer was sold would soon be closed. The fact also shews the reasonableness of the alleged custom, which is not a custom like gavelkind or borough English, but in the nature of a usage of trade, or of a custom of a county with reference to farming. There can be no more difficulty in ascertaining the limits of such a custom than in ascertaining those of the *Liverpool* cotton market, which have been repeatedly recognised in Courts of Law. It is well settled that parol evidence of such customs is admissible for the purpose of construing written agreements; and, as observed by *Parke*, B., in *Hutton* v. *Warren* (2), "this has been done upon the principle of presumption, that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages:" *Smith* v. *Wilson* (3); *Bayliffe* v. *Butterworth* (4); *Cuthbert* v. *Cumming* (5); *Graves* v. *Legg* (6); *Humfrey* v. *Dale* (7).

If the Plaintiffs succeed in their contention, it will become impossible to carry on business. How will it be possible, for example, to ascertain the priorities of four different mortgagees,

(1) 6 H. L. C. 581.
(2) 1 M. & W. 466, 475.
(3) 3 B. & Ad. 728.
(4) 1 Ex. 425, 429.
(5) 11 Ibid. 405.
(6) 2 H. & N. 210.
(7) 7 E. & B. 266.

M. R. 1871 MENZIES v. LIGHTFOOT.

who from time to time make advances and give notice of having done so?

LORD ROMILLY, M.R.:—

I will now state what at present I take to be the right view of the case.

There are two questions in this case: one is the construction of the documents themselves, and the other is the question of the custom of the trade. It is first important to look at the documents without any reference to the custom of the trade. Supposing an ordinary advance to have been made by one person to another, and then an advance by a third person subject to the first, and the person who makes the second advance to have given notice to the person who made the first, such transactions might take place at different periods of time, or they might take place at the same moment on the same day. It is desirable in this case to consider the matter on both suppositions. First, suppose that the publican executes a deed by which he charges the property for £1250, together with any further sum or sums of money for which he might at any time become indebted, not exceeding £1500; and that afterwards, on another day, he gives another charge to another person for £200, and further advances, and says it is subject to the prior security; and thereupon the person who has got the second charge informs the person who has got the first charge that he has made this advance; and that person who made the first advance afterwards made further advances, can he claim priority in respect of such subsequent advances made since the receipt of such notice?

It is quite settled that, if there is no limit to the amount of the further advances to be made under the first mortgage, subject to which the second is given, then notice to the first mortgagee prevents him from advancing any further money in respect of which he can have priority over the second mortgagee. Such were precisely the facts in the case of *Gordon* v. *Graham* (1). *A.* mortgaged to *B.* for a term of years, to secure a sum of money already lent to *A.*, and also such other sums as should thereafter be lent or

(1) 2 Eq. Cas. Abr. 18.

advanced. *A.* made a second mortgage to *C.* for a certain sum, with notice of the first mortgage, and then the first mortgagee, having received notice of the second mortgage, lent a further sum to *A.* Lord *Cowper* held, that in that case *C.* could not redeem without paying the whole of the further advances, as well as the original sum. That decision was overruled by the House of Lords in *Shaw* v. *Neale* (1) and *Hopkinson* v. *Rolt* (2), and cannot now be held to be law.

Hopkinson v. *Rolt* was the case of a banker who took a security for the balance of a mortgagor's account limited to £20,000. It was held that, as soon as notice was given of a subsequent mortgage, the banker could not get priority for any further advances that he made. That authority, therefore, establishes that the mere fact of having specified in the first mortgage, as has been done here, that the further advances are not to exceed a fixed sum, does not in the slightest degree vary the rule. If this were a case between a banker and his customer, the fact of saying that the security is for £1250, and further advances not exceeding £250 (book debts being, in my view, exactly the same as further advances), this circumstance would not in any way affect the second mortgagee, who had given notice of his charge to the first mortgagee; and I do not consider that there is any distinction in this case. The fact is, that the limit is put in for the benefit of the mortgagor, in order to enable him to shew that, whatever further advances have been made, they cannot have exceeded £1500, so that if the property is worth more than the accumulated sum, more money may safely be advanced upon it. The question might be varied, or rather be prevented from arising, if the charge was given to the distiller in the form mentioned by one of the witnesses in this case; that is, if the second charge were made, not "subject to the security" merely (because everybody who has notice of a mortgage deed knows that it is subject to the security created by that deed), but if it were made "subject and without prejudice to all principal money now due to the brewers, and to such sum as I may hereafter owe them for goods sold and delivered, not exceeding, with the sum of £1250,

(1) 6 H. L. C. 581. (2) 9 H. L. C. 514.

M. R. 1871 MENZIES v. LIGHTFOOT.

the sum of £1500." If that had been the form of the charge given to the Plaintiffs in this case, they would have taken it subject to the £1500, and it would not matter when the advance was made, that amount having been expressly stated as the limit, subject to which the second mortgagees take their charge. It is true that the security was for "future advances;" but the cases have determined that, unless you not only specify the amount of the further advance, but also unless you say that you take your charge subject to that particular amount, the first mortgagee is only entitled to priority for the money advanced by him before notice of the charge was given. I cannot conceive a more serious state of circumstances than would arise if that doctrine were to be overruled; because, as was well pointed out by Lord *Chelmsford*, nobody could ever advance any money at all, or ever could get any advance on any security at all, where further advances of indefinite amount might be made.

Such, then, is the law where the advances are made on different days. The next question is, whether, if in that state of things such is the proper construction of these documents, this construction is affected by the circumstance that the transactions took place simultaneously. It does not appear to me that it is in the slightest degree affected by that circumstance. It is admitted that the charge is subject to the prior security. Everybody who has notice of that security advances his money subject to that security. The question is, what is the meaning of the words "that security?" It is a security to secure £1250 and future advances, but you stop those future advances the moment you give notice that you have advanced your money, unless the mortgagor has expressly stipulated that you shall allow the first mortgagee to have a charge to the extent of the advances. That is the law as laid down by the House of Lords. Does it make any difference that the second charge is made at the same moment with the mortgage? Supposing there is a day between, or supposing there is a year between, how does that affect it at all? It is subject to the prior charge, which he knows of; and the true construction of which is that you stop the further charges the moment you give notice of your advance.

I do not think that in this instance there is any evidence of any

understanding or agreement which in the slightest degree affects the question.

Then it is said that if this be so decided the result will be, that it will be totally impossible to carry on the business of a brewer. But why cannot they take care that such a form is used as is in the memorandum which has been put forward, and to which I have already referred? It is admitted, and if not admitted it is fully proved, that in practice the brewers have the first charge, and that the distillers have the second charge, but the extent of the brewers' first charge ought to be limited to an amount to be specified in the document by which the distillers' charge is created.

I come now to consider the question of custom, that is, whether this matter is varied by the fact that it is a transaction between a a brewer and a distiller, and in which case it is urged that the question of custom and usage is material, and ought to be taken into consideration. Custom no doubt can give a particular meaning to a particular word, of which many instances are given in the case of *Lady Hewley's Charity* in the House of Lords. But how can the custom alter the construction of a written instrument? Where a written instrument is silent, the custom is of the greatest importance, unquestionably. If two instruments had been given, and a charge for £1250 in favour of Messrs. *Lightfoot*, and a charge of £200 in favour of the Plaintiffs, and these had been given without saying a word as to which was to have the priority, and both were signed, sealed, and delivered at the same moment, then unquestionably the evidence of custom would have been most material to shew that the brewer always had priority, and that the distiller always came second. But the only custom which could be made to assist the Defendants in any way would be a custom which established that the brewer is entitled to have priority over the distiller for all advances whenever made by the brewer; and if this were so, all the future advances made by the brewer would have to be paid before the distiller was paid at all. That argument has been completely destroyed by the case of *Daun* v. *City of London Brewery Company* (1), which came before the Lord Justice *James*. It is true that the Lord Justice makes an observation which has been very much dwelt upon by Mr. *South-*

(1) Law Rep. 8 Eq. 155.

M. R. 1871 MENZIES v. LIGHTFOOT.

gate; but I take it the Lord Justice did not mean to express that, wherever the transactions were simultaneous, the brewer would necessarily obtain a right to do that which otherwise by law he could not do without a special contract for the purpose. Unquestionably, if there was a contract for the purpose, he would be entitled to priority; but if there is merely an ordinary mortgage, such as a banker takes, and a second mortgage of a similar description subject to it, then I am of opinion that the ordinary law must govern the rights of the parties, and that no custom can regulate the subject.

Now all that the evidence appears to establish is this, that it is the custom, wherever there are two charges, that the brewer has priority in respect of his charge over the charge of the distillers. Supposing, however, they stipulated to the contrary, would the custom overrule them? Here is an express law applying to documents of this description, which the custom cannot vary and cannot alter. My opinion, therefore, is, that upon the state of this case as it stands at present, the Plaintiff is entitled to recover; but as this is a matter of great importance, and as there is a great deal of evidence given in this case, though I was desirous to state what my first impressions were, I do not intend my judgment to be final until I have had the opportunity of reading over the whole of the evidence on the subject.

March 20. LORD ROMILLY, M.R.:—

I have looked over this case very carefully, but I see no reason to alter the view I expressed about it, which I will shortly repeat.

The evidence as to custom has really nothing whatever to do with the case. The distiller took a mortgage subject to the security previously given to the brewer. The security to the brewer is a security for £1250 and future advances; but it is decided by *Hopkinson* v. *Rolt* (1), and in all the late cases, that the effect is the same as if they had said "subject to the security as it stands at the moment;" that is, to the amount of money now due on the security. If the parties wish to escape from this, they must take the charge

(1) 9 H. L. C. 514.

in the form to which I referred on the former occasion; that is, they must say, "subject and without prejudice to the principal moneys now due from me, and to such sums as I may hereafter owe, not exceeding the sum of so-and-so." Then, if the second mortgage be taken subject to that, that is the contract between the parties; but if it is taken subject to the security then existing it means the money then actually due on that security, and no more. So far from seeing that this will in the slightest degree affect the whole course of business between brewers and distillers, it will do nothing more than this—it will compel them to express distinctly what they mean. If they choose to do it, they may say that the charge is subject to the money now due, and also subject to all future sums which shall become due under the previous security; but if they mean that, they must express it plainly. Here the charge was simply made subject to the previous security, that is, subject to the money then due on the security, which was £1250. I think that *Hopkinson* v. *Rolt* (1) strictly applies, and the evidence of custom, even if it were uniform, which it is not, is merely evidence of custom to give to a written document a meaning other than that affixed to it by the decision of the House of Lords.

I agree, therefore, in all respects with the contention of the Plaintiffs, and they must have a decree accordingly.

Solicitors: Messrs. *Minet, Smith, & Harvie;* Messrs. *Bridges, Sawtell, & Co.*

(1) 9 H. L. C. 514.

M. R.

1871

April 24.

SANGER *v.* SANGER.

*Judgment Debt—Married Woman—Debt incurred before Marriage—Separate Estate—Restraint on Anticipation—Charging Order—*3 *&* 4 *Vict. c.* 82, *s.* 1—*Married Women's Property Act*, 1870 (33 *&* 34 *Vict. c.* 93), *s.* 12.

Section 12 of the *Married Women's Property Act*, 1870, extends to property settled to the separate use of a married woman without power of anticipation.

After the passing of the *Married Women's Property Act*, 1870, and on the same day on which a marriage took place, but subsequently thereto, judgment was entered up against the wife for a debt incurred previously to the marriage. The judgment creditors subsequently obtained a charging order on the wife's interest in a fund in Court, to the income of which the wife was entitled, for her separate use, without power of anticipation:—

Held, that the charging order constituted a valid incumbrance on the fund.

THIS was a Petition for a stop order.

William Sanger, by his will, gave to his wife *Jane Sanger* during her life an annuity of £300 a year, for her separate use, without power of anticipation.

The testator died in 1857. This suit was afterwards instituted for the administration of his estate, and, under orders of the Court, a fund had been set apart to answer the annuity.

The Petitioners had brought an action against *Jane Sanger* to recover a debt incurred by her after the death of the testator. On the 19th of January, 1871, judgment was entered up in the action for £346 0*s.* 6*d.*

On the same 19th of January, but earlier in the day, *Jane Sanger* intermarried with *William Hutchinson*. No settlement was made on the occasion of the marriage.

On the 10th of March, 1871, an order was made in the action by Mr. Justice *Lush*, charging the fund in Court, which had been set apart to answer the annuity, with £346 0*s.* 6*d.*, and interest at 4 per cent. from the 19th of January, 1871.

The Petitioners now asked for a stop order on the same fund.

Sir *R. Baggallay*, Q.C., and Mr. *W. R. Ellis*, for the Petitioners, referred to the 12th section of the *Married Women's Property*

Act, 1870, which enacts as follows: "A husband shall not by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage; but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts as if she had continued unmarried."

Mr. *Charles Browne*, for *Hutchinson* and his wife:—

Charging orders were first introduced by 1 & 2 Vict. c. 110, s. 14. It was doubted whether the words of that enactment were sufficient to cover funds standing in the Court of Chancery, or to reach the interest of persons entitled to dividends only, and not to *corpus*. The Act 3 & 4 Vict. c. 82, was passed to remove such doubts, and under it the charging order in question has been made. But sect. 1 of that Act provides that no such order "shall have any greater effect than if such debtor had charged such stocks, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in any such order." Now, upon the second marriage of Mrs. *Sanger*, the restraint on anticipation attached itself to this fund; consequently she could not have affected it by any charge; and but for the recent Act, a charging order would have had no effect on it. It is submitted that the Legislature, in passing the *Married Women's Property Act*, 1870, could not have intended, without express words, to abolish restraint on anticipation, and that sect. 12 extends only to such separate estate as a married woman can dispose of.

But if this be not so, this particular remedy belongs only to judgment creditors; and the debt in question did not become a judgment debt of the wife until after her marriage; consequently the section does not apply at all.

LORD ROMILLY, M.R.:—

I am against the Respondents on both points.

As to the first, I am quite sure that the question did not escape the attention of Parliament, if that has anything to do with the matter. I have a distinct recollection that the effect of this section was pointed out while the Act was under discussion, and it

M. R. 1871 SANGER v. SANGER.

was said, and very forcibly, that as the liability of the husband was taken away, it was only just that the liability should be fastened on the whole property of the wife. At all events, I am of opinion that, on the true construction of the Act, the 12th section extends to property of a married woman which is subject to a restraint on anticipation.

Then, as to the other point, I cannot divide a day. That is a principle which I have frequently had to apply. I think this must be treated as a good incumbrance; and the result is, that the lady must pay the debt out of any money that may be coming to her in respect of this annuity.

Solicitors: Messrs. *Lydall & Sweeting*; Mr. *Hutchinson*.

M. R. 1871 *March* 16.

BANKS *v.* GOODFELLOW.

Practice—Costs—Will, Validity of—Suit by Heir-at-law against Devisee—Issue directed by Court—Adverse Verdict—Costs in Equity.

Where the heir-at-law of a testator filed a bill against the devisee and executor impeaching the validity of the will, and an issue was directed which resulted in the validity of the will being established:—

Held, that the bill must be dismissed without costs as regarded the devisee, and that the Plaintiff must pay the costs of the executor.

THIS was a suit by the heir-at-law of a testator against the devisee under the will and the executor to set aside the will, on the ground of the alleged want of testamentary capacity on the part of the testator.

An issue was directed by the Court, which was tried, and the result was a verdict establishing the validity of the will.

The Court of Queen's Bench discharged a rule for a new trial, and upheld the ruling of the Judge before whom the case was tried (1).

The question now was, as to the costs of the suit.

Mr. *Jessel*, Q.C., for the Plaintiff, contended that the bill should be dismissed without costs, as in *Scaife* v. *Scaife* (2) and *Tatham* v. *Wright* (3).

(1) Law Rep. 5 Q. B. 549. (2) 4 Russ. 309.
(3) 2 Russ. & My. 31.

Mr. *Dixon*, for the infant devisee, contended that, as the Plaintiff had failed, he should pay the costs in equity as well as at law.

[He referred to *Johnson* v. *Gardiner* (1), *Gough* v. *Botevel* (2), *Seal* v. *Brownton* (3), and *Luxton* v. *Stephens* (4).]

Mr. *Speed*, for the executor, who was also lessee of a term of part of the property.

LORD ROMILLY, M.R., held that the bill must be dismissed without costs, as regarded the devisee; and that the Plaintiff must pay the executor's costs.

Solicitor for the Plaintiff: Mr. *J. G. Waugh*.
Solicitors for the Defendants: Messrs. *Nethersole & Speechly*.

(1) 1 Dick. 313.
(2) Ibid. 396.
(3) 3 Bro. C. C. 214.
(4) 3 P. Wms. 373.

V.-C. S.

1871

May 10.

SKOTTOWE *v.* YOUNG.

Legacy Duty—55 *Geo.* 3, *c.* 184, *s.* 2—*Stranger in Blood*—*Children Legitimated by Foreign Law*—*Domicil*—*Status.*

17 L.T. 268
284-6296
21 L.T. 102
24 L.T. 641

The proceeds of land in *England* devised by a British subject domiciled in *France* on trust to sell and pay the proceeds to his daughters born of a French mother before marriage, but afterwards legitimated according to French law:—*Held*, liable to legacy duty at £1 per cent. only.

THOMAS SKOTTOWE, a British subject descended from an English father, was resident and domiciled in France from a period long prior to 1853, until his death. He had cohabited with a French woman, by whom he had two daughters, *Jeanne S. M. Skottowe* and *Célinie J. M. Skottowe*, born respectively in 1851 and 1852. On the 26th of October, 1853, he was married, according to the law of *France*, to the same lady. On that occasion the two daughters were legitimated, according to the law of *France*, by a declaration of the father and mother. They had a son born afterwards, *Paul Skottowe*.

Thomas Skottowe, by his will, dated the 5th of June, 1865, devised certain real estate which he possessed in *England* to *Henry Young* and others, upon trust to sell the same with all convenient speed at their discretion, with certain powers until sold, and directions to apply the rents accrued and to accrue until the sale in the same way as the income of the moneys of the proceeds of the sale. The testator then, after certain directions as to payment of debts and as to investments, directed his trustees to divide the capital money and the investments into four equal parts, and to hold the same as to one-fourth on trust during the life and until the second marriage of his wife, to pay the income to his said wife or her assigns for her or their own benefit, and from and after her decease or second marriage to hold the said fourth part on the trusts declared as to the other three fourth parts; and as to a second fourth part, he directed his trustees to stand possessed thereof upon trust during the life of his daughter *Jeanne*, to pay the dividends and income thereof into the hands of his said daughter, to her sole and separate use, without power of anticipation, and from and after her death

for her children as she should appoint; and as to one three-fourth share, upon trust for his daughter *Célinie* and her husband upon similar trusts; and as to the remaining fourth part, upon trust for his son *Paul*.

The testator died in July, 1868, leaving his widow and three children him surviving. The will was proved on the 20th of November, 1868, by the trustees. On the 17th of April, 1869, a decree was made for the administration of the real and personal estate of the testator.

Questions having been raised between the Inland Board of Revenue and the parties beneficially interested in the property as to the rate of legacy duty payable, this Petition was presented, praying that it might be declared that £1 per cent. only was payable.

Mr. *Dickinson*, Q.C., and Mr. *Hemming*, for the Petition :—

It is admitted that the gift to the two daughters born before marriage is liable to legacy duty, and the *Succession Duty Act*, therefore, has no application; the only question is, as to the rate of duty, and this turns on the *Legacy Duty Act*.

The testator had a French domicil; and the status of his children must be governed by French law. By that law the daughters have the status of children, and the English Court must so regard them. In *Wallace* v. *Attorney-General* (1) Lord *Cranworth* puts almost the very case occurring here (2): "Suppose," said his Lordship "a French father dying and leaving an illegitimate child, having recognised him in the mode prescribed by the French code, so as to give him the status of a legitimate child. To what duty is that child to be liable? It is hardly reasonable to say that he is to be ascertained by the French law as being entitled to some, and in certain cases to all, the rights of a legitimate child, and yet that we are to treat him for the purposes of duty as a mere stranger." Yet it is exactly what Lord *Cranworth* thought hardly reasonable that the Commissioners now seek to do. These young ladies must be treated by the English Courts as legitimate; but yet, with reference to the rate of legacy duty, they are said to be strangers in blood. The Court in this country must recognise the status of the Petitioner as wife; and in this case the Commissioners admit

(1) Law Rep. 1 Ch. 1. (2) Law Rep. 1 Ch. 8.

V.-C. S. 1871 SKOTTOWE v. YOUNG.

her status though her marriage was celebrated according to French law, but deny the status of the daughters which depends on the same law. These children must clearly be treated as children within the meaning of the *Legacy Duty Act.*

[*Du Hourmelin* v. *Sheldon* (1) was also mentioned.]

Mr. *W. W. Karslake,* for the Commissioners of Inland Revenue:—

This is an English will, and valid only according to the laws of *England.* Every rule, therefore, of English law as to the right to land would apply to this case. Suppose there were no trusts for conversion, it would be impossible to contend that these ladies could take as children.

In *Birtwhistle* v. *Vardill* (2) it was held that a child born before marriage, though legitimate according to Scotch law, could not take, as heir of his father, lands in *England. Munro* v. *Munro* (3) was the converse case, because there it was held, that a child illegitimate according to English law, but legitimate according to Scotch, could take as lawful heir to Scotch entailed estates. It follows that, in order to determine in what character a devisee can take the proceeds of real estate, regard must be had to the law of the country where the real estate is situated. The same principle was laid down in another form in *Re Don's Estate* (4).

Again, this being an English will, relating to English real estate, the word "child" or "children" must mean such persons as the law of *England* would understand by children; that is, legitimate children: *Boyes* v. *Bedale* (5).

The case of *Wallace* v. *Attorney-General* (6) referred only to personal estate.

[*Shaw* v. *Gould* (7) was also cited.]

SIR JOHN STUART, V.C.:—

The only question here is, whether these ladies, who, according to the law of *France,* have the status of children, must in this

(1) 4 My. & Cr. 525, 532.
(2) 7 Cl. & F. 895.
(3) Ibid. 842.
(4) 4 Drew. 194.
(5) 1 H. & M. 798.
(6) Law Rep. 1 Ch. 1.
(7) Law Rep. 3 H. L. 55.

country be considered as "strangers in blood" within the meaning of the *Legacy Duty Act* (55 Geo. 3, c. 184), s. 2.

If, as seems clear, the daughters of the testator are legitimate by the law of *France*, and must, therefore, in this country be considered as having the status of children, it is difficult to see how, in any sense, they can be "strangers in blood." Where the *Legacy Duty Act* uses these words, it is as a description of the status of the person.

In *Birtwhistle* v. *Vardill* (1) it was admitted that the claimant had in *England* the *status* of the eldest legitimate son of his father; but inasmuch as he claimed to be heir, and as such entitled to inherit land in *England*, his status of eldest legitimate son was not enough, and he was held bound to prove that he was "heir" according to the law of the country in which the land was situated. As he was unable to prove that he was the eldest son of his father born in wedlock, he failed to shew that he filled the character of heir, though he did establish his status of eldest legitimate son.

It is said that the words "stranger in blood" include the status known to English law as applied to English persons; but this will is that of a domiciled Frenchman, and his status and that of his children must be their status according to the law of *France*, which, according to *Birtwhistle* v. *Vardill*, constitutes their English status.

If in *Birtwhistle* v. *Vardill* the claimant's status was that of eldest legitimate son of his father, it would be absurd to say that he was a stranger in blood.

The status of these ladies being that of daughters legitimated according to the law of *France* by a declaration of the father, it is impossible to hold that they are for any purpose strangers in blood, on the mere ground that, if they had been English and their father domiciled in *England*, they would have been illegitimate.

The trust for conversion is valid; and the subject of the gift is therefore personal estate; and the legacy duty must be at the rate of £1 per cent.

Solicitors: Messrs. *Young, Jackson, & Co.; Solicitors of Commissioners of Inland Revenue.*

(1) 7 Cl. & F. 895.

V.-C. M.
1870
Nov. 5, 19, 21; Dec. 10, 13.
1871
Jan. 17.

In re IMPERIAL LAND COMPANY OF MARSEILLES. *Ex parte* COLBORNE AND STRAWBRIDGE.

Debentures—Promissory Notes—Negotiable Instruments—Contract to pay the Bearer — Equities between Company and original Holder—Amount of Interest—Winding-up under Supervision—Supervision Order relating back to confirmatory Resolution.

The directors of a company, having power by its memorandum of association to borrow money and to issue transferable or other bonds, mortgages, or debentures, had, under its articles of association, large powers for issuing "debentures, bonds, obligations, or other securities, either specifically charged on any property of the company, or not so charged, in any form or manner or for any amount," not exceeding the nominal capital of the company, and a specific power to issue and indorse negotiable instruments.

The company issued in payment to vendors of land to them instruments described on their face as "debenture bonds," and stamped as bonds, and expressed that the company "bind themselves and their successors to pay the bearer the principal sum of £20." The words with respect to interest were in similar form, and there was no charge on any of the property of the company. The instruments were sold in open market.

The company being now in course of winding-up, it being admitted that the company had equities against the parties to whom the instruments were originally issued:—

Held, 1. That the instruments were promissory notes, or if not promissory notes, negotiable instruments, and amounted to contracts to pay any one who might happen to be the bearer. 2. That, consequently, holders for value without notice of the equities were entitled to prove for the amount due free from equities. 3. That the right to prove was not affected by the fact that holders had purchased after the passing of resolutions to wind up the company, though without notice of their having been passed.

The winding-up, which commenced by resolutions duly confirmed, was being continued under the supervision of the Court:—

Held, that the supervision order related back for all purposes to the confirmatory resolution, and consequently that the proof could only be made for the principal and interest to the date of the confirmatory resolution; and that this question was not affected by the fact that interest had been paid to a later date.

THESE were two adjourned summonses by persons who had purchased in open market debentures granted by the company, and the cases were taken as representative of the general body of the holders for value of the debentures, without notice of the original contract between the company and the persons to whom they were

issued. Two cases were taken, in the first of which, Mr. *Colborne's* case, the debentures were purchased after a resolution to wind up the company had been passed, and confirmed, though without actual knowledge of it; in the latter, Mr. *Strawbridge's*, some of them were purchased before the passing of the resolution. The applicants claimed to prove in the winding-up for the amount due upon the debentures held by them.

The company was formed on the 19th of January, 1866, by registration of a memorandum and articles of association; and by clause 5 of the memorandum of association one of the objects for which the company was established was stated to be, "The borrowing of money and the issue of transferrable or other bonds or mortgage debentures, or any other securities founded or based upon all or any of the real or personal assets of the company."

The following clauses of the articles of association related to borrowing powers:—

"25. The directors may issue debentures, bonds, obligations, or other securities of the company, either specifically charged on any property of the company, or not so charged, at any time in any form or manner, and for any amount, which the directors may from time to time determine, provided that the total amount of such securities shall not at any time exceed the amount of the nominal capital of the company for the time being without the sanction previously given of an extraordinary general meeting."

Clause 60 provided that, without limiting the general authority thereby given to the directors, they should have the following specific powers, amongst which were:

"(*i*). To issue bonds, obligations, or mortgage debentures in payment of any lands or buildings, or for any rights or privileges acquired by the company, to such extent, and founded upon such securities, and generally upon such terms and conditions as they may think fit.

"(*k*). For the purposes of the company, to make, draw, accept, or indorse any promissory note, bill of exchange, or other negotiable instrument."

"93. Every bond, obligation, or mortgage debenture issued by

V.-C. M. 1870

In re Imperial Land Company of Marseilles. *Ex parte* Colborne and Strawbridge.

the company for securing money borrowed or due from the company shall be by deed under the common seal of the company.

"94. A register of bonds, obligations, or mortgage debentures shall be made and kept by the company, in which shall be entered the number and date of every such bond, obligation, or mortgage debenture, and the sum secured thereby, the names of the parties thereto (if any), with their proper additions, and all other necessary particulars with respect to such bonds, obligations, or mortgage debentures."

The company commenced business by the purchase of land at *Marseilles*, and as part payment for the land issued to the vendors, or other persons supposed to be interested in the land so purchased, instruments to a large amount in the following form:—

"£20. Debenture Bond. 500 fr.

"*The Imperial Land Company of Marseilles, Limited.*

"No. 320. Incorporated under the *Companies Act*, 1862.

"Debenture for £20 sterling.

"The *Imperial Land Company of Marseilles, Limited*, hereby bind themselves and their successors to pay to the bearer the principal sum of £20 on the 31st day of March, 1872, such payment to be made at the *National Bank*, No. 13, *Old Broad Street*, in the city of *London*.

"And the said *Imperial Land Company of Marseilles, Limited*, hereby further bind themselves and their successors to pay to the bearer interest at the rate of 6 per cent. per annum upon the said principal sum of £20, by equal half-yearly instalments, on the 30th day of September and the 31st day of March in each and every year, until the said principal sum of £20 shall be duly paid and satisfied, and according to the coupons hereto annexed, the first of such half-yearly payments to be made on the 30th day of September, 1866, and to be continued half-yearly up to the 31st day of March, 1872, when this bond is entitled to be paid off at par as hereinbefore mentioned.

"In witness whereof, the common seal of the *Imperial Land Company of Marseilles, Limited*, has been hereto affixed this 31st day of March, 1866."

Coupons for payment of interest in the following form were attached to the instrument:—

"*The Imperial Land Company of Marseilles, Limited.*

"Debenture Bond D., No. 320, for £20.

"Interest Coupon, No.

"For twelve shillings sterling. Payable at the *National Bank*, 13, *Old Broad Street, London.*

"*George M. Bright*, Secretary."

The debentures were stamped with a bond stamp for the amount named in them.

The words "debenture bond" at the top of the instrument were printed in an ornamental border, and there was a French translation of the body of the instrument in a column parallel with the English words. The corresponding word to "debenture" in the French translation was "obligation." Each of the debentures, when issued, was marked with a distinctive number, and was entered in the register provided in accordance with clause 94 of the articles of association.

A resolution was passed at an extraordinary meeting of the company on the 22nd of August, 1867, and confirmed at a subsequent meeting on the 5th of September, 1867, to wind up the company voluntarily; and on the 22nd of September, 1868, an order was made on a Petition to continue the winding-up under the supervision of the Court.

The debentures so issued were brought into the market from time to time, and on the 14th of September, 1867, Mr. *Colborne* purchased, for £100, twenty-five of them at a sale at the office of the *London Stock and Share Company*, which was a company whose business it was to hold periodical public sales, by auction or otherwise, of shares, stocks, and securities of joint stock companies. He stated, in an affidavit, that he had no knowledge at the time he bought the debentures of the passing of the winding-up resolutions, or that the original issue of the debentures was in any way irregular.

Mr. *Strawbridge*, a stockbroker and a member of the *Stock Exchange*, purchased at the *London Stock and Share Company*

V.-C. M. 1870 — *In re* IMPERIAL LAND COMPANY OF MARSEILLES. *Ex parte* COLBORNE AND STRAWBRIDGE.

twelve debentures of the company, for £84, on the 10th of May, 1867, and twenty-five debentures, for £106 5*s.*, on the 6th of December, 1869, and at another similar office, called the *Open Stock Exchange Company*, three debentures on the 1st of December, 1869, for £12 15*s.*, and from another person five more on the 6th of April, 1870, for £26 5*s.* The first purchase was, consequently, before the passing of the winding-up resolution. Mr. *Strawbridge* stated, in his affidavit, that he had no notion of any invalidity or irregularity in the contract under which the debentures were originally issued, and that on inquiring at the office of the company he was informed that they were valid instruments. Interest was regularly paid on presentation of the coupons at the bankers of the company till the 31st of March, 1869.

An affidavit by Mr. *Samuelson*, one of the liquidators of the company, stated the facts as to the issue of the debentures, which left no doubt that the company could set up equities to a large amount against the persons to whom they were originally issued, and the liquidators now claimed to set up these equities, and sought to make the present applicants prove in the winding-up, subject to them.

Mr. *Chitty*, for Mr. *Colborne*:—

Instruments of this kind are promissory notes, or at all events negotiable instruments of some kind, and consequently a *bonâ fide* holder for value, without notice of equities between the company and the original holders, is entitled to prove for the full amount, free from any equities. The instruments do not shew upon their face any transactions between the company and the persons to whom they were issued, and it would be impossible for a purchaser in the market to trace them back to the original holder. They are similar to the instruments issued by the *General Estates Company*, which the Lord Justice *Selwyn*, in *Ex parte City Bank* (1) held to be promissory notes; and the Lord Justice *Wood* thought that was the better opinion, but at all events considered that they were negotiable instruments. In *In re Natal Investment Company* (2) the words were: "The company undertakes to pay to *A.*, or to his executors, administrators, or transferees, or to the

(1) Law Rep. 3 Ch. 758. (2) Law Rep. 3 Ch. 355.

holder for the time being;" and it was held that the words meant "to the person legally entitled to hold," who was the transferee. In *Ex parte New Zealand Banking Corporation* (1) the words were, to pay to "*Blakely & Dent*, and their executors, administrators, or assigns, or to the bearer thereof;" and the decision was, that the holders were not subject to equities.

[The VICE-CHANCELLOR:—The ground of the decision in that case was, that the company, by their articles of association, had contracted to pay the bearer of the debenture.]

There is nothing in the omission of the words "value received" to prevent a debenture being a promissory note: *White* v. *Ledwick* (2); *Cresswell* v. *Crisp* (3); *Hatch* v. *Trayes* (4). No particular form of words is required: *Byles* on Bills of Exchange (5); *Kent's* Commentaries (6). It is immaterial whether the purchase took place before or after the winding-up: *Ex parte Swan* (7); as to which Lord Justice *Giffard*, in giving judgment in *In re European Bank* (8), says: "The law on this subject cannot be better stated than is done by Vice-Chancellor *Malins* in his judgment in *Ex parte Swan*." The form of the instrument is quite inconsistent with its being a bond, as may be seen by comparing it with the debenture in such a case as *Athenæum Life Assurance Society* v. *Pooley* (9).

Mr. *W. W. Cooper*, and Mr. *Locock Webb*, for Mr. *Strawbridge*:—

The articles of association give power to the directors to issue negotiable instruments, and these are such in form. The distinction between the cases of *Ex parte City Bank* (10) and *In re Natal Investment Company* (11) is plain. In the former, the words were entirely commercial; in the latter, the legal terms "executors" and "administrators" were inserted, and Lord *Cairns* felt himself obliged to treat them as technical words. In *Aslatt* v. *Farquharson* (12), debentures in a commercial form were treated as cash.

(1) Law Rep. 3 Ch. 154.
(2) 4 Doug. 247.
(3) 2 C. & M. 634.
(4) 11 A. & E. 702.
(5) 10th Ed. p. 6.
(6) 10th Ed. vol. iii. p. 95.
(7) Law Rep. 6 Eq. 344.
(8) Ibid. 5 Ch. 358, 362.
(9) 1 Giff. 102; 3 De G. & J. 294.
(10) Law Rep. 3 Ch. 758.
(11) Ibid. 355.
(12) 10 W. R. 458.

(19 SC 4 Jur N.S. 371; 5 L. 129

V.-C. M. 1870

In re Imperial Land Company of Marseilles. *Ex parte* Colborne and Strawbridge.

Mr. *Strawbridge* has, at all events, by the inquiry he made at the office, prevented the company from setting up any equities against him: *Higgs* v. *Northern Assam Tea Company* (1); *Ex parte Universal Life Assurance Company* (2); *Hulett's Case* (3); *Woodhams* v. *Anglo-Australian Assurance Company* (4).

Mr. *Jackson* appeared for the *Crédit Foncier*, the holders of a large number of debentures, but was not allowed to be heard.

Sir *Roundell Palmer*, Q.C., Mr. *Glasse*, Q.C., and Mr. *Higgins*, for the liquidators of the company:—

By reference to the register of debentures, it appears that these instruments were issued to a Mr. *Masterman*; and from the affidavit of Mr. *Samuelson*, it appears that they were paid to him as part of a fraudulent bargain between him and the directors of the company; and if that case is established, it will be an equity to which these debentures are subject, if they are subject to any equities.

The whole case turns on whether they are bonds or promissory notes. If they are bonds, the case of the holder almost entirely breaks down.

A promissory note is an instrument not under seal; and though an instrument may be negotiable, though under the seal of the company, because sealing is the usual mode of signature by a company, that consideration does not apply to the present case; for by clause 60, (*i*) and (*k*), of the articles of association, the directors have power to issue for the company negotiable instruments, which, by sect. 47 of the *Companies Act*, 1862, may be made and indorsed by any one for the company. On the other hand, "obligations" are required to be under seal. If these debentures are not bonds, it is impossible for the company to make a bond. Each instrument is called a "debenture bond," and in French "obligation;" and it is expressed that the company "bind themselves to pay." It cannot be both a promissory note and a bond, and it is called a bond; and in order to entitle the holder to prove upon it, there must be an original valid contract to begin with, for the present holder can be in no better position than the

(1) Law Rep. 4 Ex. 387.
(2) Ibid. 10 Eq. 458.
(3) 2 J. & H. 306.
(4) 3 Giff. 238.

party to whom the instrument was issued: *Athenæum Life Assurance Society* v. *Pooley* (1); *Aberaman Ironworks* v. *Wickens* (2). In the present case, the original contract was tainted with fraud. In *Ex parte New Zealand Banking Corporation* (3) Lord Justice *Rolt* rejected the view that the mere use of the word "bearer" concluded all question; and the decision of that case was made on the ground that there was an original valid contract to accept the bearer, and that transaction could not be attacked. In *Ex parte City Bank* (4) the company necessarily required to issue negotiable instruments, and the original transaction shewed what sort of instruments were intended; and it is not immaterial that the stamp is the proper one for a bond, nor that all words such as "for value received" are omitted, in a case where the original transaction is impeached. *Aslatt* v. *Farquharson* (5) and *Higgs* v. *Northern Assam Tea Company* (6) were cases of set-off, not of equities. The winding-up fixed the rights of all parties, and it is incumbent upon those who bought the debentures afterwards to shew that there was a debt due at the time of the winding-up. The instruments would not have been good as bills of exchange, because there was no payee named: *Rex.* v. *Richards* (7); *Reg.* v. *Randall* (8). The Court will not assist parties who seek to evade the law, which fixes parties taking bonds with the equities of the original holder, by leaving out the holder's name. The *Nowgong Tea Company* and the *Northern Assam Tea Company* issued similar instruments, which have been treated as subject to equities.

Mr. *Cotton*, Q.C., and Mr. *Westlake*, for the creditors' representative:—

This is a question of equities, not of set-off. *Ex parte New Zealand Banking Corporation* was decided not on the ground that bonds might be made negotiable, but that the company had contracted themselves out of their rights. Here there is no representation, as in *Ex parte City Bank*, that value had been given, but merely that a contract had been entered into to pay that sum, and that contract was tainted with fraud.

(1) 1 Giff. 102; 3 De G. & J. 294.
(2) Law Rep. 5 Eq. 485, 516, 517.
(3) Ibid. 3 Ch. 154.
(4) Ibid. 758.
(5) 10 W. R. 458.
(6) Law Rep. 4 Ex. 387.
(7) 1 Russ. & Ry. 193.
(8) Russ. C. C. 185.

V.-C. M. 1870 *In re* Imperial Land Company of Marseilles. *Ex parte* Colborne and Strawbridge.

Mr. *Chitty*, in reply:—

Whatever these instruments are, they are not bonds; as bonds they would fail altogether, on account of not having any obligee named. A bond cannot be made payable to bearer: *Ex parte New Zealand Banking Corporation* (1); *Sheppard's Touchstone* (2); *Green* v. *Horne* (3); *Cruise's* Digest (4).

Documents should be interpreted so as not to destroy, but to give effect to them. Clause 60 of the articles of association is an enabling clause, and does not prohibit issuing promissory notes under seal: *Halford* v. *Cameron's Coalbrook Steam Coal and Swansea and Loughor Railway Company* (5). The mere addition of the seal of the company does not invalidate the instrument, and its whole frame is commercial and not legal. An instrument drawn as a bill of exchange, but defective for want of a drawee, has been held valid as a promissory note: *Peto* v. *Reynolds* (6).

Sir R. Malins, V.C.:—

This is a case of the greatest possible importance, I apprehend, not only to joint stock companies and other bodies in the habit of issuing negotiable instruments, whether called debentures, bonds, or otherwise, but also to the public at large. I am perhaps not wrong in saying that it is a case as important as any that has ever been argued under the *Winding-up Acts*, and on account of its importance I should have reserved my judgment if the case had not been opened a fortnight ago, when the leading authorities were referred to; and then, and on Saturday, and since, I have had opportunities of referring to and considering every authority that was cited, and of reading the papers in private, and I do not feel that if I were to defer my judgment I could possibly deal better with the case than I can now, when the whole of the arguments are fresh in my mind.

The question I have to decide is, the effect of issuing debentures or debenture bonds by public companies. The debentures, or bonds, or promissory notes, or whatever they may be called in this case, are made payable to bearer, and were purchased either

(1) Law Rep. 3 Ch. 154.
(2) Page 367.
(3) 1 Salk. 197.
(4) Vol. iv. tit. xxxii. c. 8.
(5) 16 Q. B. 442.
(6) 9 Ex. 410.

18 Jur 472.

at what is called the *London Stock and Share Company*, or in a similar way for value (the amount given for them, I apprehend, makes no difference), and were bought on the faith of being made payable to bearer, as they are in fact expressed, and I have now to decide whether they can be enforced by the holder for the time being in his own name, or whether he must take them subject to the equities which existed between the company and the person to whom they were issued originally. It is said, and I suppose truly, that these bonds or documents were issued to a Mr. *Masterman* to carry out a fraudulent transaction, whereby he sold land to the company for more than £3,200,000, which he and others with him bought for a much smaller sum, and put the difference into their pockets. For the purpose of my decision, I will assume that there are equities arising out of this transaction which might be set up against Mr. *Masterman* by the company if he remained the holder of the documents; and the question is, whether such equities can be set up against purchasers from him.

[His Honour then, after reading the parts of the memorandum and articles of association above set out relating to borrowing powers, and describing the instruments in question, and stating generally that the directors had full power to issue them in their actual form, continued:—]

Now the question before me is, whether those who hold these instruments, which had been issued, and were circulating in the market to the extent of about £400,000, can recover as against the company, there being nothing upon the face of the transaction illegal or improper. One object of this association was to raise money to facilitate their operations, and with that view to issue instruments which should be binding upon them, and pass freely in the market; and if it is admitted that an instrument payable to *A. B.*, or order, when indorsed by *A. B.*, becomes payable to bearer, and passes as freely as a bank-note, there is nothing illegal or improper in so treating these instruments; and as regards the interests of the company, I am of opinion that the greater the facility given for dealing with them in the market, the better it must be for those who issue them; and if I were to accede to the argument addressed to me, that these instruments are to be taken by the holder, subject to the equities between the company and the

V.-C. M. 1870

In re Imperial Land Company of Marseilles, *Ex parte* Colborne and Strawbridge.

person or persons to whom they were originally issued, I apprehend that I should in effect render them unmarketable, because they would be thrown into such discredit that no man in his senses would ever deal in them.

Much has been said about this being a question as to which of two innocent parties should suffer, Mr. *Colborne* and Mr. *Strawbridge* being taken as representing the holders of these instruments, and the other innocent party being the body of shareholders of the company. Where that is clearly the position of the parties, it may be that the Court is bound to balance between them, and see upon the whole what is to be done. This is, however, chiefly a shareholder's question, being as to whether calls are to be made upon them to pay these bonds; and if shareholders commit their interests to a body of directors unknown to them, of whose capacity for business and integrity they are ignorant, and are unfortunate in selecting men incapable or dishonest (and here the allegation is that they have been unfortunate in selecting those that were dishonest), on whom ought the loss to fall? On those who have selected such persons, or those who, dealing with the company, have no opportunity of knowing the facts? I have no hesitation in coming to a conclusion, upon general principles, that between two such parties the loss ought to fall upon the shareholders, and not upon purchasers who honestly and fairly buy articles or commodities which were intended to be marketable, and were issued with the marks which entitle them to be so treated.

This being, in my opinion, the general view applicable to the case, I have now to consider what is the nature of these instruments. I am clearly of opinion that, whether they were promissory notes, or bonds, or debentures, it was within the powers conferred upon the directors, by the clauses I have read from the memorandum and articles of association, to issue them. Are they, then, promissory notes or debentures? or does it make any difference which they are in the result? My opinion is that, whichever they are, the result is the same, because they in any case make a contract by which the company have bound themselves to pay not to any particular person, but to any person who may be the bearer, the sum appearing to be due upon their face. But if they are promissory notes, there is an end of the question. What, then, is a

promissory note? The common form is, "I promise to pay *A. B.*," or "I promise to pay the bearer"—as, for instance, a *Bank of England* note, which runs, "I promise to pay to the bearer so many pounds for the Governor and Company of the *Bank of England*." The note being signed by a particular clerk, passes freely, and is paid to any one who may be the bearer. But if an instrument is expressed, "I bind myself to pay," that is also a promissory note; or, in short, anything from which a Court can collect an obligation on the one side to pay in favour of another is a promissory note, whether the maker is an individual or a public company. Under the 47th section of the *Companies Act*, 1862, an agent for the company might have signed an instrument containing any form of words, by which it was made apparent that the company was to pay, and another person or the bearer was to receive, and it would have been a valid promissory note. A promissory note may be in a long form or a short form, or to pay on a certain day without interest, or at a distant day with interest. Any person may make a promissory note payable twenty years hence, with interest half-yearly, and the *Statute of Limitations* would not begin to run till the expiration of that period. In this case it is a long form, by which the company bind themselves at the end of six years from the date of the instrument to pay £20, with half-yearly interest in the meantime at 6 per cent., for which coupons or notes are annexed. That is, in my opinion, a promissory note, and not less so because it is called a debenture. I agree with Mr. *Chitty*, that a debenture merely means an instrument which shews that the party owes and is bound to pay. It is not less so because at the top it is called debenture bond. I need not refer to the authorities, which shew that it is not necessary that the consideration should be stated on the face of a promissory note, for the point was not contested. The consideration will be implied, and the obligation to pay £20 is just as binding as if it had been expressed, "in consideration of £20 received from *A. B.*, we bind ourselves to pay *A. B.*, or order, the sum of £20 within six years." But suppose the instrument not to be a promissory note, but a bond or debenture, or anything else, it is equally binding on the company, because it is a representation by the company to all the world that they will, at the expiration of six years, pay

V.-C. M. 1870 *In re* Imperial Land Company of Marseilles. *Ex parte* Colborne and Strawbridge.

the sum for which it is given to the holder, together with interest half-yearly in the meantime. And it would be contrary to every principle, and fatal to the existence of such instruments in this and all other companies, if in the hands of every person taking them they were subject to the equities between the company and the original holder; it would be a blow to the mercantile transactions of this country far beyond the value of any protection to be afforded to the members of this company, who, if they were unfortunate, were unfortunate in being betrayed by the persons to whom they committed their interests. Every principle of public policy calls upon me to repudiate the notion that such documents are to be treated like bonds or *choses in action,* in which the equities between the parties can be entered into.

Such would have been my conclusion apart from authority. The authorities, however, are not all reconcileable; but I am happy to find that the latest case, *Ex parte City Bank* (1), supports precisely the view which I have expressed. There is one distinction between that case and the present, which is an immaterial one. In that case, which has been so much commented upon, and which I have read again and again, and considered as much as I am capable of considering it, the Master of the Rolls made an order admitting the *City Bank* to prove on certain instruments, subject to any equities existing between the original holder and the *General Estates Company;* and, in effect, made the instruments utterly worthless. The question came by way of appeal before the Lords Justices, and every word of their judgment I apprehend is applicable to this case.

8 QB 382

The Lord Justice *Wood* says (2): "I incline to think that this instrument is a promissory note; but if not, I think it is an instrument coming within the principles of *In re Agra and Masterman's Bank* (3) and *In re Blakely Ordnance Company*" (4). *In re Agra and Masterman's Bank* is a case in which a person had a letter of credit with which he went abroad. It was in the usual form, authorizing the holder to draw upon the bank. The holder of the letter of credit had drawn upon the bank, and the Lords Justices held, reversing the decision of the Vice-Chancellor *Wood*,

(1) Law Rep. 3 Ch. 758.
(2) Ibid. 761.
(3) Law Rep. 2 Ch. 391.
(4) Ibid. 3 Ch. 154.

that the case was one in which no equity could, under the circumstances, be set up. And the Lord Justice was referring not to his decision but to that of the Appeal Court. He continues: "The case is stronger in favour of the assignee than in either of those cases, for each of these instruments is more like a promissory note than anything else. It being stamped with a deed-stamp cannot affect the question, there being nothing to prevent a promissory note being so stamped. It is under seal; but so, in the absence of special powers, must every instrument be which is executed by a corporation. If there had been in these articles any provision, such as we often find, providing for the issuing negotiable instruments not under seal, the argument from the use of a seal would have had much more weight. The instrument is called on the face of it a debenture, which, so far as it goes, is in favour of its being a deed, and not a promissory note; but when we look at its contents, we find that the company thereby undertake to pay to the order of *Hodges*, on the 1st of July, 1867, the sum of £1000, with interest at the rate of £5 per cent. per annum, which, apart from the immaterial substitution of "undertake" for "promise," is the simple and ordinary form of a promissory note. Corporate bodies may issue promissory notes and bills of exchange where the nature and character of their business warrant it. Here the nature and character of the business is such that the issuing negotiable instruments would be an ordinary and almost necessary incident to it. The better opinion seems to me to be that this is a promissory note." This is in accordance with the conclusion I arrive at in the present case—that these instruments are either promissory notes, or distinct promises to all the world that the company would pay to the order of the person named, and that it is not competent for the company afterwards to set up equities of their own; and I should have deeply regretted it if I had found myself bound by any decision to hold the contrary. Here I have the decision of the Superior Court, which says: "If it be not so, the authorities go to this, that where there is a distinct promise held out by a company informing all the world that they will pay to the order of the person named, it is not competent for that company afterwards to set up equities of their own, and say that, because the person who makes the order is indebted to them, they

V.-C. M. 1870 *In re* Imperial Land Company of Marseilles. *Ex parte* Colborne and Strawbridge.

will not pay." Now, I was much pressed upon this with the decision of Lord *Cairns* in *In re Natal Investment Company* (1); and Lord Justice *Wood* thus disposes of it: "As regards the *Natal Company's* case, I do not think that the Lord Chancellor there overruled the other cases. In that case there was an agreement to pay to a certain individual, 'his executors, administrators, or transferees,' which his Lordship held equivalent to 'his executors, administrators, or assigns.' Thus far, therefore, the instrument was in the form of an ordinary money bond, but there were the added words, 'or to the holder for the time being of this debenture bond;' and the Lord Chancellor said those words were not intended to control the general character of the instrument, but were only intended to dispense with the necessity of executing a formal assignment by deed. There the instrument was, in other respects, in the ordinary form of a covenant to pay, while here it is in the form of a promissory note payable to order." Then Lord Justice *Selwyn* says (2): "I also think that in this case the company clearly had power to issue negotiable instruments, especially having regard to the 86th clause of the articles. It then remains to be seen whether, according to its true construction, this is a negotiable instrument. The case seems to be stronger than that of *Agra and Masterman's Bank*, because there there was a letter of credit which was capable of being put an end to at any time; but in the present case these instruments were finally issued by way of a cash payment. From the nature of the transaction it is to be inferred that it was intended to give negotiable instruments, for they were given in substitution for mortgages, and their being negotiable appears to be the only consideration for the exchange. Then, as to their being under the seal of the company, in the absence of any special power an instrument under seal is the only instrument by which a corporate body can contract at all. The present case is broadly distinguishable from that of the *Natal Company* on the grounds mentioned by the Lord Justice. I think, therefore, that these must be treated as negotiable instruments, and that the order of the Master of the Rolls must be varied by striking out the words making the proof subject to equities." In the case before the Lord Justice *Rolt*, *Ex parte New Zealand Banking*

(1) Law Rep. 3 Ch. 355. (2) Law Rep. 3 Ch. 763.

Corporation (1), there was a contract to sell the business to the company, and they were to give Mr. *Blakely* and Mr. *Dent*, who sold it, notes payable to bearer; and the notes were accordingly made payable to them, "their executors, administrators, and assigns, or to the bearer thereof," upon a certain day; and the question was, whether the person who held the note could have an equity set up against him. Lord Justice *Rolt* relied very much upon the form of the original contract. He says (2): "They are payable to bearer, and the object and intention of the parties in making them so payable was, no doubt, to give to any person taking them the right of resorting for payment directly to the obligors, without regard to any equities that might exist between them and the original obligees;" and, further, he says (3): "In *In re Agra and Masterman's Bank* (4), it was held that the rule which makes assignments of *choses in action* subject to the equities existing between the original parties to the contract, must yield when a contrary intention appears from the nature or terms of the contract. I adopt that decision. I think it applicable, as above explained, to the facts of this case." Therefore he also came to the conclusion that the holders of these notes were entitled to prove for them irrespective of any equities existing between the company and the original maker, and those equities were altogether discarded, in fact, by his judgment.

Then, with regard to *In re Natal Investment Company* (5), it was said that all these three cases, *Ex parte City Bank* (6), *In re Natal Investment Company*, and *Ex parte New Zealand Banking Corporation* could stand together. It is not necessary for me to go into that question, because it is clear that the Lords Justices, in *Ex parte City Bank*, did not consider that they were overruling *In re Natal Investment Company*. I have already observed that I am unable to see how *In re Natal Investment Company* can be reconciled with *Ex parte New Zealand Banking Corporation* and *Ex parte City Bank*. In *In re Natal Investment Company* the bonds were made payable "to the holder, his executors, administrators, or transferees, or to the holder for the time being of the debenture bond." I am unable to see any distinction between "payable to

(1) Law Rep. 3 Ch. 154.
(2) Ibid. 159.
(3) Ibid. 160.
(4) Law Rep. 2 Ch. 391.
(5) Ibid. 3 Ch. 355.
(6) Ibid. 758

V.-C. M. 1870 *In re* IMPERIAL LAND COMPANY OF MARSEILLES. *Ex parte* COLBORNE AND STRAWBRIDGE.

bearer," and "to the holder for the time being," because the bearer is the holder for the time being. But if the cases are inconsistent, I am bound by the latter case, in which the former one was fully considered: and, with every respect to Lord *Cairns*, I cannot help coming to the conclusion that he might with great propriety have decided *In re Natal Investment Company* (1) the other way.

The same principle may be collected from the case of *Aslatt* v. *Farquharson* (2), also before Vice-Chancellor *Wood*, in which debentures were issued by a limited company, and certain ships were assigned to trustees upon trust to secure "to the holders for the time being" of the debentures their nominal amount. Some of these debentures were issued to agents of the company, who had incurred expense on its account. An assignee for value from the agents having sought to have the debentures paid out of the proceeds of the sale of the ships, the company alleged that there were outstanding accounts between themselves and their agents, on which a large balance would be found due to them; but the Vice-Chancellor, without calling for a reply, said (3), that "he should consider this case clear of the question raised on the form of the trust deed, by which the trustees were to stand possessed of the proceeds of the sale of the ships, in trust to pay 'to the holders for the time being' of the debentures the amount thereby secured. It might be doubted whether this form of the deed would give any higher right than would be otherwise possessed by the holders of debentures. But if it did not, this form of the deed was very improper, for it was not fair or honourable to represent, in reference to non-assignable instruments, that the trusts of the deed were for the holders of them. However, it was not necessary to decide this point, for if an action were brought by *Croskey* on the debentures" (that was the person to whom they were originally issued), "he would succeed. These debentures were given for good consideration, and were intended to be treated as cash. The question was, whether, when they had been so given, and then accounts went on between the parties for a long time, there could be any right of set-off at law. The ships were assigned, and the debentures were to be paid when funds should be realised. The property was ample, and the

(1) Law Rep. 3 Ch. 355. (2) 10 W. R. 458.
(3) 10 W. R. 459.

engagement having now ripened into an available security, could the company be allowed to say they believed that, if the accounts were taken, a sum would be found due to them? The nature of these accounts might be judged from the fact that a suit in respect of them had been pending for two years. It would be most unjust to defer payment of these debentures until settlement of the accounts, even if *Croskey* had been Plaintiff: and therefore the present Plaintiff's right was clear to have the proceeds of the sale of the ships handed over to him." No other case of importance was referred to, for the numerous cases referred to as to the effect of a promissory note all go to shew that there is no particular form necessary, and that the nature of the stamp makes no difference.

Upon all those grounds, therefore, I come to the conclusion that it was within the power of the directors to issue debentures payable to bearer. They have issued them in the form of promissory notes; and it is clear, upon every general principle, that the company are not at liberty to set up against the holders of these notes any equities they have as between themselves and the persons to whom they were originally issued. I adopt the language of Lord Justice *Wood* (1), as conclusive upon the subject: "The authorities go to this, that where there is a distinct promise held out by a company informing all the world that they will pay to the order of the person named, it is not competent for that company afterwards to set up equities of their own, and say that, because the person who makes the order is indebted to them, they will not pay."

Though the instrument is written both in English and French, I must treat it as an English document, and as such it is immaterial that it is not stated to be for value received.

The only other point necessary to be mentioned is with regard to the fact that the debentures were bought by Mr. *Colborne* on the 14th of September, 1867, and consequently after the resolution to wind up, which was on the 5th of September, 1867. It is immaterial, because it is distinctly sworn that Mr. *Colborne* had no notice of the resolution to wind up, and the advertisement in the *Gazette* is only notice to those who see it. The debentures

(1) Law Rep. 3 Ch. 762.

V.-C. M. 1870 *In re* IMPERIAL LAND COMPANY OF MARSEILLES. *Ex parte* COLBORNE AND STRAWBRIDGE.

were at the time carrying interest, which continued to be paid till March, 1869.

It is not necessary to go any further into Mr. *Strawbridge's* case, because the only difference between the cases is, that he is in rather a more favourable position as to some of his debentures, which he bought before the resolution to wind up. He also made inquiries at the office, and was told they were valid documents, and upon every ground I come to the conclusion that his claim must be admitted as against the company.

The two cases have been brought forward in a most proper manner—by Mr. *Colborne,* as representing the class held by him, and by Mr. *Strawbridge,* as representing the class held by him—and I believe it is arranged that the costs of all parties are to come out of the estate.

Dec. 10. When the order came to be drawn up, it appeared that the question had not been determined for what amount the claimants were entitled to prove upon the debentures. Interest having been paid, as the coupons fell due, till the 31st of March, 1869, the Registrar drew up the order for the total amount of principal and interest so paid. The company, however, objected to the proof being allowed for a larger amount than the principal and the interest to the date of the passing of the winding-up resolutions, and contended that any payment of interest beyond that period, if made by the company, should be treated as a payment on account of the principal of the debt. It was stated that some portion of the interest had been paid, without the knowledge of the company, by the *Consolidated Land Company of France,* which was a company formed for the purpose of taking over its assets and liabilities.

Mr. *Glasse,* Q.C., and Mr. *Higgins,* for the company:—

It is not disputed that this company is insolvent, and consequently the question necessarily arises, what amount the debenture holders are entitled to prove for. Where there is a compulsory order, interest stops from the commencement of the winding-up: *Warrant Finance Company's Case* (1); *Ebbw Vale Company's Case* (2). The

(1) Law Rep. 4 Ch. 643. (2) Law Rep. 5 Ch. 112.

scheme of the *Companies Act*, 1862, was to make the rights of parties under a winding-up under supervision the same as they would be under a compulsory order. Therefore the time for stopping interest is the commencement of the voluntary winding-up, and the debt should be taken for the purpose of proof just as it stood at that time.

Mr. *Chitty*, for Mr. *Colborne*:—

The principle on which the decisions as to stopping interest on a compulsory winding-up is based is the assumed insolvency of the company. But that reason does not apply to a voluntary winding-up, which may be made for many other reasons than inability to pay debts: *In re East of England Banking Company* (1). A voluntary winding-up is an act of the shareholders, not of the creditors, and does not bar the right to a compulsory order. Then, if a voluntary winding-up does not stop interest, it is impossible that a subsequent supervision order can relate back to the confirmatory resolution so as to affect the amount for which creditors are entitled to prove, and interest ought to be allowed till the supervision order.

Mr. *W. W. Cooper*, and Mr. *Locock Webb*, for Mr. *Strawbridge*.

Mr. *Glasse*, in reply:—

The supervision order is, by sect. 151 of the *Companies Act*, 1862, made equivalent to a winding-up. Here the question is not as to rights between shareholders and creditors, but between different creditors *inter se*. The supervision order relates back to the confirmatory resolution, just as is the case in bankruptcy: *Weston's Case* (2).

SIR R. MALINS, V.C.:—

The present question, as to what is the amount for which debenture holders are to be entitled to prove, was not argued previously; and I think, upon the authority of the *Warrant Finance Company's Case* (3), that the rule is clearly settled that, in a compulsory winding-up, debts bearing interest can only be proved for the debt and so much of the interest as is actually due at the commence-

(1) Law Rep. 4 Ch. 14. (2) Law Rep. 4 Ch. 20.
(3) Law Rep. 4 Ch. 643.

V.-C. M. 1870 — *In re* IMPERIAL LAND COMPANY OF MARSEILLES. *Ex parte* COLBORNE AND STRAWBRIDGE.

ment of the winding-up. Whatever day is fixed upon in the case of a winding-up under supervision, the interest will be calculated for proof till that day, without prejudice to a claim for subsequent interest if it should turn out that there is a surplus applicable to the purpose. It is admitted that a mere voluntary resolution to wind up will not stop interest from running; but I am satisfied, from the sections of the *Companies Act*, 1862, referred to by Mr. *Glasse* and Mr. *Higgins*, that a voluntary winding-up with a supervision order has, in all respects, the same operation as if it had been originally a compulsory order. The only question then is, from what date the supervision order must be considered to be in operation. There is much to be said in favour of its operating from the time it is made, because there has been an interval of fifteen months, during which the debenture holders have received interest, and the effect of making the supervision order relate back to the confirmatory resolution would be to make that which was a payment of interest a payment on account of capital, and the proof would only be for the balance, after deducting what was paid. On the other hand, I think it better to proceed upon broad general principles than to draw minute distinctions. And as it has been settled that for some purposes the supervision order relates back to the confirmatory resolution, and makes it the date of the commencement of the winding-up, I think better that there should be a general rule that, where there has been any order to continue a winding-up under supervision, it should be considered not as operating simply from its date, but as relating back to the confirmatory resolution, Considering that in most cases the supervision order follows closely upon the resolutions, I think this, on the whole, the better rule, though in some cases it may produce some inconvenience and injustice. The proof will therefore be for the amount of principal and interest due on the debentures till the 5th of September, 1867. The order will be dated from to-day.

Dec. 13. The matter was again mentioned, and the Vice-Chancellor wished to be referred to the authorities which decided that the supervision order related back to the confirmatory resolution.

Mr. *Glasse*, and Mr. *Higgins*, referred to *Weston's Case* (1), *Dawes Case* (2), and *Hornby's Case* (3), which, they stated, had been followed by His Honour in *Re Pneumatic Tube Company*.

V.-C. M. 1870 *In re* IMPERIAL LAND COMPANY OF MARSEILLES. *Ex parte* COLBORNE AND STRAWBRIDGE.

1871. Jan. 17. SIR R. MALINS, V.C.:—

I have looked at the cases as to the payment of interest on the debentures, and upon them the case is clear. In a voluntary winding-up, followed by a supervision order, interest stops from the date of the winding-up; and the sole question is, whether the commencement of the winding-up dates from the confirmatory resolution or the supervision order. I find it clearly settled by the authorities that the supervision order is merely a continuation of the voluntary winding-up, and therefore the winding-up commences with the confirmatory resolution. The order will therefore be that interest stops from the 5th of September, 1867.

13 Eq. 627

Solicitors: Mr. *J. Fraser*; Mr. *J. C. G. Bennett*; Messrs. *Abrahams & Roffey*; Messrs. *G. S. & H. Brandon*; Messrs. *Linklater, Hackwood, Addison, & Brown*.

In re MOSELEY'S TRUSTS.

V.-C. M. 1870 Dec. 21. 1871 Jan. 13, 20.

Will—Remoteness—Rule against Perpetuities—Gift to a Class—Severance of the Objects of the Gift.

Gift on trust for *A.* for life, and after her death for all her children who should attain twenty-one, and the issue of such of them as should die under that age leaving issue, "which issue shall afterwards attain the age of twenty-one years, or die under that age leaving issue at his, her, or their decease or respective deceases, as tenants in common if more than one, but such issue to take only the share or shares which his, her, or their parent or parents respectively would have taken if living."

Next page

None of the children of *A.* died under twenty-one leaving issue:—

Held, that the whole gift was not void as infringing the rule against per-

---

(1) Law Rep. 4 Ch. 20. (2) Law Rep. 6 Eq. 232.
(3) 16 W. R. 1164.

V.-C. M.
1870
In re MOSELEY'S TRUSTS.

petuities, but that it might be severed, and the shares only would be void as to which the specified event happened.

Observations on *Webster* v. *Boddington* (1), and *Seaman* v. *Wood* (2).

THIS was a question of construction arising upon a clause in the will of *Joseph Moseley*, which was dated the 25th of April, 1831. The testator, after giving a legacy of £3000 to trustees upon trust to pay the interest to his daughter, *Mary Jordan*, for her life for her separate use, provided as follows:—

"And from the decease of my said daughter my will is, that the sum of £3000, the securities for the same, and the produce thereof, shall be in trust for all the children of my said daughter who shall attain the age of twenty-one years, and the lawful issue of such of them as shall die under that age leaving lawful issue at his, her, or their decease or respective deceases, which issue shall afterwards attain the age of twenty-one years, or die under that age leaving issue living at his, her, or their decease or deceases respectively, as tenants in common if more than one, but such issue to take only the share or shares which his, her, or their parent or parents respectively would have taken if living."

The testator died on the 27th of May, 1831.

None of the children of *Mary Jordan* died under twenty-one leaving issue, but some died under age without leaving issue. Five attained twenty-one, of whom two died in their mother's lifetime, and the remaining three survived her.

Mary Jordan died on the 16th of March, 1869, and the legacy of £3000 was paid into Court by the trustees. The three surviving children and the representatives of those who were dead now petitioned for payment of the legacy to them.

Mr. *Glasse*, Q.C., and Mr. *Peck*, in support of the Petition:—

The gift is to the children of *Mary Jordan* in the first instance, and not to children and grandchildren as a class; so that, if there were any invalidity as regards the gift to grandchildren from its being supposed to infringe the rule against perpetuities, it would only affect the share as to which the event had taken place; and

(1) 26 Beav. 128. (2) 22 Beav. 581.

that event not having taken place in any instance, the gift is wholly good. V.-C. M. 1870 *In re* Moseley's Trusts.

Mr. *Pearson*, Q.C., and Mr. *Higgins*, for the residuary legatee:—

The bequest is entirely void. It is a gift to a class, the members of which would not necessarily be ascertained within the period allowed by the rule against perpetuities. The question is quite covered by authority. The rules regulating the validity of a bequest of this kind are clearly laid down in *Cattlin* v. *Brown* (1), and it is shewn that such a gift can only be divided, and held valid as to such of the objects as do not happen to infringe the rule, where the gift to every member of the class is distinct from that to any other member; and *Seaman* v. *Wood* (2) and *Webster* v. *Boddington* (3) shew that the present case does not come within that description.

Mr. *Darley* for the trustees.

Mr. *Glasse*, in reply:—

The question as to whether such a gift as this is to be treated as one to a class is still open: *Jarman* on Wills (4); and in *Wilson* v. *Wilson* (5) a similar clause was treated as being valid. In *Webster* v. *Boddington* the class was limited only by the words, "such issue taking a parent's share." Here the words were, "the share which the parent, if living, would have taken." The children and grandchildren are not treated as one class, which is the true test of validity, as appears from *Stuart* v. *Cockerell* (6).

Jan. 20. Sir R. Malins, V.C., after reading the clause in the will above set out, continued:— 1871

There were five sons of the daughter, all of whom attained twenty-one; and though there were other children who died under twenty-one, none of them left issue. The result, therefore, was, that the class who were to take consisted of those five sons,

(1) 11 Hare, 372.
(2) 22 Beav. 591.
(3) 26 Ibid. 128.
(4) 3rd Ed. vol. i. p. 246.
(5) 28 L. J. (Ch.) 95.
(6) Law Rep. 7 Eq. 363; Ibid. 5 Ch. 713.

1871

In re MOSELEY'S TRUSTS.

and the legacy vested in them, unless the objection which is raised to the validity of the bequest upon the ground of remoteness can be sustained.

It was argued by Mr. *Pearson* and Mr. *Higgins*, for the residuary legatee, that the gift is void for remoteness, because it includes objects who could not necessarily be ascertained within twenty-one years after the termination of a life in being at the death of the testator. If the gift had been to the children and grandchildren as a class, that would undoubtedly have been the case, because the grandchildren would not necessarily be twenty-one years of age within twenty-one years after the death of their grandmother, but here the number of objects must be ascertained within twenty-one years after the death of the testator. It is to the children who attain twenty-one, and the issue of those who die under that age, so that necessarily the whole number of the class will be ascertained within a life in being and twenty-one years. The property, therefore, is to be divided into as many shares as the number of children who attain twenty-one, and who die under that age leaving issue, and the issue are to take just that which the parent would have taken if he had lived to attain twenty-one years.

I apprehend it is the duty of every Court to sustain a will and give effect to it if possible; and although the rule of law that property cannot be tied up beyond a life in being and twenty-one years must be adhered to, yet, if the limitation can be divided so as to be good as to some shares and bad as to others, it is the duty of the Court to give effect to it as far as it can, and not hold that every part of it is void; so that, if one of the children had died under twenty-one leaving issue, the gift to his issue would have been void for remoteness, because his children would not necessarily have been born at the death of *Mary Jordan*. But that that fact should not affect the gift to the children who did attain twenty-one appears to me, upon principle, as plain as anything can possibly be.

But some cases were relied upon by Mr. *Pearson* and Mr. *Higgins* in opposition to this view, the first of which was *Webster* v. *Boddington* (1); but there the limitation is confused and general in

(1) 26 Beav. 128.

terms, and is not, as in this case, by way of substitution to the issue of those who died under twenty-one leaving issue, and the period at which the children are to die is not even fixed. The gift is to the legatee's children, "whether of her present or future marriage, and the issue of such grandsons, or other child or children who, being a son or sons, shall live to attain the age of twenty-one years," but the issue of granddaughters were only to take the parent's share. I must say I think it might very well have been held that the gift was to the children who attained twenty-one and the issue of those who died under twenty-one; and if that had been the disposition of the property, as in the present case it is, I am satisfied that the Master of the Rolls would have held the limitation to be valid, for he says (1): "If, on the death of Lady *Webster*, the estate is to be divided into as many shares as there are children of Lady *Webster* who survive her and children of Lady *Webster* who have predeceased her, leaving children, then it is perfectly good; but if it be necessary to wait until either all the children of Lady *Webster* shall have attained twenty-one, or until some child, or remoter issue of a child, of Lady *Webster* shall have attained twenty-one after her decease, in order to ascertain the number of shares into which the estate is to be divided, then it is void for remoteness, as the class to take is not to be ascertained until after a period which may exceed a life or lives in being and twenty-one years afterwards." This case, therefore, is no authority against the conclusion at which I arrive, because it is not limited to the issue of children who died under twenty-one. I think, nevertheless, that a little more liberality of construction might have led to the view that the gift was to the children who attained twenty-one, because of the words "the issue are to take the parent's share."

Another case cited, also a decision of the Master of the Rolls, was *Seaman* v. *Wood* (2), which undoubtedly is very like the present case. Indeed, I do not think it is possible to distinguish the two cases; and, therefore, if I am bound by that case, I must hold this limitation to be void. In both cases the grandchildren were only to take the share which their parent would have taken if living. Now the judgment, which is very short, and appears to have been

(1) 26 Beav. 134. (2) 22 Beav. 591.

V.-C. M. 1871 *In re* MOSELEY'S TRUSTS.

given at the end of the argument, and I do not understand to have been a considered judgment, is in these few words (1): "My opinion is, that this gift is void for remoteness. I concur in the argument that this is a question of construction upon the meaning of the words of the gift. But the way I look at it is this: If a man gives an estate or a sum of money to all the children of *A.* and all the grandchildren of *B.*, to be divided among them in equal shares and proportions, and both *A.* and *B.* survive the testator, I have very little doubt that such a gift would be void for remoteness."

I have not a shadow of doubt that it would be void for remoteness, because there it is a class, children of *A.* and grandchildren of *B.* all thrown together, to take *per capita.* The gift to one part of the class is necessarily void for remoteness; and, according to *Leake* v. *Robinson* (2), when one part of a gift to members of the same class is void, the whole gift is void for remoteness.

Then his Lordship continues: "For the class which consists of the children of *A.* and the grandchildren of *B.* cannot be ascertained until the grandchildren of *B.* are ascertained, and that will be at a period too remote." Then he puts this question: "Would the case be varied if the children were to take one-half of what the grandchildren were to take?" or, as it is interpreted in *Jarman* on Wills (3), "Would the case be varied if the children were to take one-half and the grandchildren the other half?" In my opinion it would be totally varied, because if one moiety of any property is given to the children of *A.* at twenty-one, that is a valid limitation; but if the gift is to grandchildren at twenty-one, it is an invalid gift. Therefore, the gift is good as to one moiety and bad as to the other. And the question is so answered in Mr. *Jarman's* book. The Master of the Rolls, however, came to the conclusion that the limitation was void for remoteness. With great respect I come to an entirely opposite conclusion; and I think that the limitation to the children who attained twenty-one was good, and the rest void. The class consisted of the children who should attain twenty-one, or die under that age leaving issue, the issue to take only the parents' share. At the death of the testator the maximum number is ascer-

(1) 22 Beav. 594. (2) 2 Mer. 363.
(3) 3rd Ed. vol. i. p. 245.

tained, and the property is divided into as many shares as there are children who attain twenty-one, or die under that age leaving issue. Then, if the limitation as to the subsequent class is one which would necessarily take effect within twenty-one years after a life in being, it is good; but if it would not so take effect it is bad.

The principle of severing gifts was adopted, and has been acted upon frequently, and especially by the Lord Chancellor, when Vice-Chancellor, in the case of *Cattlin* v. *Brown* (1), where the principle upon which such gifts may be severed is clearly stated, and it is only necessary to refer to one passage in the judgment, where the Vice-Chancellor says (2): "The testator devises the estate to *Thomas Bannister Cattlin* for life, with remainder to all his children as tenants in common for life, with remainder as to every share of every child to the children of that child in fee. Now, to follow the respective shares of the property, suppose *Thomas Bannister Cattlin* to have four sons, *A.*, *B.*, *C.*, and *D.*, and *A.* and *B.* to be living at the testator's death, and the others to be born afterwards. *A.* and *B.*, on the testator's death, take an immediate vested interest in remainder for life, expectant on their father's death, with remainder to their respective children in fee, subject to their respective moieties being diminished on the birth of *C.* and *D.*, but their exact shares are ascertained within the legal limits at the death of their father, and neither their life interests, nor the remainder in fee, are capable of being wholly divested in favour of any party beyond the legal limits." It is, in reality, the case of *Storrs* v. *Benbow* (3), substituting a given share for a given sum of money. Therefore he held, as I have stated, the limitation to be good as to the children of such children as were living at the death of the testator. The same principle of severing parts of a limitation which are good from those which are bad, was also adopted by the same learned Judge in *Wilson* v. *Wilson* (4). I may also state that there are observations upon the judgment of the Master of the Rolls in the case of *Webster* v. *Boddington*, in *Jarman* on Wills (5), with which observations I

(1) 11 Hare, 372.
(2) Ibid. 379.
(3) 3 D. M. & G. 390.
(4) 28 L. J. (Ch.) 95.
(5) 3rd Ed. vol. i. pp. 246, 250.

17 Jan 821

V.-C. M. 1871 *In re* MOSELEY'S TRUSTS.

entirely concur. The result is that, in my opinion, the event here being that there were only five children of *Mary Jordan* who attained twenty-one, the legacy absolutely vested in them. The Petitioners are three of those five sons, and they each of them take one-fifth, and the remaining two-fifths will go to the legal personal representatives, in equal shares, of the two sons, who, having attained twenty-one, afterwards died in the lifetime of the testator's daughter *Mary Jordan*.

Solicitors: Messrs. *T. White & Son*; Messrs. *Sharp & Ullithorne*.

V.-C. M. 1871 *Jan.* 31.

OLIVER *v.* OLIVER.

Legacy—General, Specific, or Demonstrative.

A testator, reciting that he was entitled, after the death of his sister, to £5602 consols, bequeathed to his son the sum of £2000 consols, part thereof, or a sum equal thereto, to be transferred or paid to him when the same should be received by his executors. After the date of his will the testator's sister died, and he received the £5602 consols, which he sold out and mixed with his other moneys. He afterwards confirmed his will by a codicil, but died without having any sum of consols:—

Held, that the legacy was specific; and that the particular fund, part of which was given to the son, being no longer in existence, the legacy failed.

Observations on *Le Grice* v. *Finch* (1).

THOMAS OLIVER the elder, on the marriage of his daughter *Jemima Pidcock*, settled a sum of £5602 5*s*. 3 per Cent. consols upon trust for his said daughter for life, and afterwards for the issue of the marriage, but upon failure of such issue, the settlor himself became entitled to the stock. *Thomas Oliver* the elder, being so entitled to the reversion of the £5602 5*s*. stock by his will, gave his daughter, the tenant for life, power to appoint £2000, part thereof, to any of his (the testator's) descendants, and the residue of the said sum of stock he bequeathed to his son *Thomas Oliver* the younger absolutely.

Thomas Oliver the elder died in the lifetime of his daughter.

(1) 3 Mer. 50.

Thomas Oliver the younger made his will, dated the 28th of April, 1865, which contained the following bequest:—

"Whereas a sum of £5602 5*s.* stock was transferred by my late father, *Thomas Oliver*, Esq., on the marriage of my sister *Jemima Pidcock* with her late husband *John Henzey Pidcock*, to the trustees of the settlement executed upon their marriage, to which sum, or some part thereof, or the securities or property now representing the same, I shall be entitled on the decease of my said sister: Now I hereby give and bequeath unto my son *Thomas William Oliver* (the Plaintiff) the sum of £2000 consols, part thereof, or a sum equal thereto, for his absolute use, and to be transferred or paid to my said son when and as soon as the same shall be received or got in by my said executors;" and after giving another legacy of £1000 to the Plaintiff, and divers other pecuniary legacies, the testator bequeathed the residue of his personal estate upon the trusts therein mentioned.

Mrs. *Pidcock* died without issue in the month of November, 1865, having, by her will, dated in July, 1862, executed the power given her by her father over the £2000 in favour of her brother, *Thomas Oliver* the younger, and upon her death the £5602 5*s.* stock was transferred to him by the trustees of her marriage settlement.

On the 16th of October, 1868, *Thomas Oliver* the younger made a codicil to his will, and thereby reduced the amount of the legacy of £2000 consols by his will bequeathed to his son *Thomas W. Oliver*, in consequence of having then recently made an advance to him, and in all other respects he thereby confirmed his will.

He died in July, 1870.

It appeared that *Thomas Oliver* the younger, after having received the £5602 5*s.* stock, and before the date of his codicil, had sold out the principal part thereof, and the remainder of such stock he had sold out and mixed with his other moneys before his death, at which time no sum of consols was standing in his name.

The bill was filed by *Thomas W. Oliver*, claiming to be entitled to the legacy of £2000, or a sum equal to the value of £2000 consols, on the ground that it was a demonstrative legacy.

The question was raised upon demurrer.

V.-C. M. 1871

OLIVER v. OLIVER.

Mr. *Glasse*, Q.C., and Mr. *J. T. Humphry*, in support of the demurrer:—

It is quite clear upon this will that the testator did not intend the £2000 to be paid out of his general estate. He says the legacy is to be part of the £5602 5*s.* which was coming to him upon his sister's death, and it was to be paid when the same should be received by his executors. It is not to be paid out of the fund, but to be part of the fund itself. This takes it out of the category of demonstrative legacies, and makes it specific, and if the fund is not in existence, the legatee cannot have part of that fund. This distinction is drawn in all the cases, such as *Kirby* v. *Potter* (1), where the legacy was directed to be paid out of the testator's reduced bank annuities, and the Court held it to be pecuniary.

The case of *Gardner* v. *Hatton* (2) is conclusive as to this principle. There the testator gave £7000 secured on mortgage of a particular estate. After the date of the will the money was received by the testator's agent, and £6000, part thereof, was invested upon another mortgage. In that case the legacy was held to be specific; and, notwithstanding that the £6000 remained due on the second mortgage at the testator's death, the legacy was declared to be wholly adeemed. This principle is also laid down in *Roper* on Legacies (3), and the Court is bound by the authorities to hold that this legacy is specific, and that, as the fund has failed, the legacy must fail altogether.

Mr. *Cotton*, Q.C., and Mr. *W. Pearson*, for the Plaintiff, *Thomas W. Oliver*:—

There can be no doubt in this case as to what was the intention of the testator. He recites that he was entitled to a sum of £5602 5*s.* upon the death of his sister. He then says: "I give and bequeath to my son (the Plaintiff) the sum of £2000 consols, part thereof, or a sum equal thereto." At the time he made his will he could not tell upon what securities the money would be placed. It was at that time in consols; therefore he used the term "consols;" but to avoid any doubt as to his intention, he adds: "Or a sum equal to £2000 consols." It was therefore a gift of £2000 consols, or a

(1) 4 Ves. 748. (2) 6 Sim. 93. (3) Page 220.

sum equal thereto. It is not a mere demonstrative legacy, but a sum of money to be paid out of a particular fund, or a sum equal thereto to be paid out of money to be got in by his executors. This makes it a legacy with a double aspect. If the stock be in existence, then it is a bequest out of that stock; but if the particular stock should not exist, then it is a legacy of a sum of money equal to a sum of £2000 stock. This view of the case is supported by the cases already decided.

In *Bronsdon* v. *Winter* (1) a testator devised a sum of £2000 stock, and though at the time of making his will he had that precise sum of stock, he afterwards sold £1500 of it, and three-fourths of the residue was turned into annuities by Act of Parliament. Still the bequest was held not to have been adeemed. A legacy of stock will be considered as general or specific, according as it may be gathered from the words of the will that the testator intended to give particular stock of which he was possessed, or intended merely that the legatee should have the quantity of stock mentioned. In the former case the bequest will be specific; in the latter it will be general. This case is distinctly within the latter definition. In *Chaworth* v. *Beech* (2) there was a legacy of the money due on a note, and it was held to be specific upon the intention; but the Master of the Rolls said, if there is the least opening to imagine that the testator meant to give a sum of money, and referred to a particular fund only as that out of which in the first place he meant it to be paid, the legatee will have the advantage, and it will be considered as pecuniary, so that the legacy should not be defeated by the destruction of the security if that should fail. The leaning of the Court always is against holding a legacy to be specific, unless the intention is clearly defined: *Le Grice* v. *Finch* (3); *Kirby* v. *Potter* (4); *Williams* on Executors (5). In this case we submit that, according to the fixed rule of construction and the manifest intention of the testator, the legacy cannot be allowed to fail. The whole question is one of intention, and the codicil puts the matter beyond doubt when the testator, after he had received the particular sum, and had

(1) Amb. 56.
(2) 4 Ves. 555.
(3) 3 Mer. 50.
(4) 4 Ves. 748.
(5) Page 1078.

V.-C. M. 1871 OLIVER v. OLIVER.

even then mixed it with his other moneys, still confirms his will in all respects, and thereby confirms his intention of giving the £2000 to the Plaintiff.

Mr. *Glasse*, in reply, cited *Deane* v. *Test* (1).

SIR R. MALINS, V.C.:—

This case is one of very considerable nicety, and I think different minds may well come to different conclusions upon it; but, on the whole, I do not feel any doubt as to the conclusion at which I ought to arrive.

It appears that Mrs. *Pidcock* was alive at the date of the will of the testator, *Thomas Oliver* the younger. His will is dated the 28th of April, 1865, and his sister did not die till the following month of November. He himself did not die till last year, 1870.

In this state of things, being entitled, at all events, to £3602 5*s.* stock, with the chance of having the other stock, it being uncertain whether he would have the whole or part of it, and it being uncertain whether he would have £5602 or £3602, or whether it would be in the shape of so much money or other funds produced by the conversion of the stock, while his sister was alive and while she was therefore tenant for life, and when it was uncertain whether she would survive him or not, he makes his will upon the assumption that she would survive him, and in that will is contained the short bequest upon which the question arises.

The simple question is, Is this a general, a demonstrative, or a specific legacy? If it is a specific legacy, that is, if it is a legacy to be paid only out of that particular fund, then the testator having received the fund in his lifetime and mixed it with his general estate, it is no longer in existence; and, because the whole would have failed, the part must necessarily fail if you cannot find the whole.

The doctrines of the Court as to specific and general legacies, notwithstanding the authorities that have been cited, do not admit of much doubt. If I give £10,000 consols standing in my name, that is specific; and if I sell the stock in my lifetime, the legacy

(1) 9 Ves. 146.

fails. If I give £10,000 stock, that is general, because the executors must buy stock to meet it, in case I do not leave stock for the purpose. If I give a sum of money to be paid out of a particular stock, that is a legacy which will take effect, although the particular security fails; but whenever it is the whole or part of a particular thing, I apprehend the legacy must fail if the thing itself fails. The case of *Le Grice* v. *Finch* (1), a decision of Sir *William Grant's*, would seem to trench upon that rule, because there the testatrix had a sum of money which was out on mortgage, in which the testatrix and her mother had a joint interest. She said: "It was the wish and desire of her mother and herself that the £500 they had then out upon mortgage should be given to the Plaintiff *Sophie Ann Le Grice* and her family in manner thereinafter mentioned." She "gave and bequeathed to the Defendants, her executors, immediately after the decease of her mother, the said £500, with all interest due thereon, upon trust for the Plaintiffs as therein mentioned." The £500 was called in, in the lifetime of the testatrix, and put in other securities. The question was, whether the gift failed. Clearly that was a bequest of £500 out on a particular security, and the security being called in the specific thing no longer existed. In the case of *Gardner* v. *Hatton* (2) the testator had £7000 out on mortgage lent to *A.;* he said: "I give the £7000 out on mortgage to *A.*," and *A.*, in the lifetime of the testator, paid it off; the testator afterwards lent £6000, part of the money, to *B.*, and there Sir *Lancelot Shadwell* held that, the thing no longer existing, the legacy failed; it was adeemed by paying off the debt.. The only way I can reconcile the case of *Le Grice* v. *Finch* with the case of *Gardner* v. *Hatton* is, that in the former case, although the fund was identified, it was a fund in which the testatrix and her mother had a joint interest, and Sir *William Grant* said they still had a joint interest in that fund. What was intended was the £500, in which she and her mother had a joint interest; and it was by a mere accident that it happened to be called in. Upon that ground it was that Sir *William Grant* decided the case. I think it runs very close, indeed, to the rule; and I am much disposed to think the decision would

(1) 3 Mer. 50.

(2) 6 Sim. 93.

V.-C. M. 1871 OLIVER v. OLIVER.

not be the same at the present day, although it is a decision of so eminent a Judge as Sir *William Grant*.

What I have to decide in this case is, whether this is a legacy with a particular security or whether it is a gift of part of the particular fund. It has been very much pressed upon me by the counsel for the Plaintiff that it is not part of the fund, but that it is £2000 to be paid at all events out of this stock. If so, it is a demonstrative legacy, a legacy having the particular security of this stock; but, looking at the whole frame of the will, I think the legacy is specific. That this is a legacy which ought to take effect I have no doubt, because what the testator intended was, that if he got the fund the son should have a part of it, and having received it in his own lifetime, the intention of the testator was that his son should have the legacy; but has he given it in such a form that I can effectuate that intention? The words are: "I hereby give and bequeath unto my said son *Thomas William Oliver* the sum of £2000 consols, part thereof." It has not been disputed that if the will stopped there—if he had said, "I give the the whole £5000," it must necessarily have failed if he had received it, as he did, and mixed it with the general estate. Then, must it not necessarily follow that it is true of a part, if true of the whole? The thing itself does not exist, and therefore as a bequest of the whole would have failed by a receipt of it and mixing it up with his general estate, it necessarily follows that it fails as to part which is given out of the general fund. Then come the words much relied upon by the Plaintiff, "or a sum equal thereto." Now, why are those words introduced? He did not know, as I have pointed out, whether the fund would be stock or money at the time of his death, whether the trustees of the settlement would not have converted it into money, invested it on mortgage, or otherwise dealt with it; and therefore, that the legacy should not fail if it happened not to be stock, he says: "I give and bequeath to my son the sum of £2000, part thereof, or a sum equal thereto;" that is, if it is not stock, he shall have so much as that would be worth, but still, I apprehend, out of the same fund. All doubt on that subject is removed by the subsequent words: "Or a sum equal thereto, for his absolute use, and to be transferred or paid to my said son when and so soon as the same shall be received or got in by my said executors." All

this shews it was a legacy to be paid out of that fund, and that fund alone. If that fund had failed, the legacy must have failed. If that fund is received and mixed up with the testator's general estate, it necessarily follows, upon the principle upon which *Gardner* v. *Hatton* (1) was decided by Sir *Lancelot Shadwell*, that the thing itself, the fund out of which the legacy is given, being no longer in existence, with the fund the legacy fails. But, at the same time, I repeat that that is manifestly against the intention of the testator. I accede to the argument, that a subsequent codicil confirming a will will not set up adeemed legacies; yet the circumstance of the testator making a codicil three years afterwards, that is, three years after the death of his sister, in which by not altering his will he confirms every part of it, shews what his intention was. He was not aware of this doctrine of ademption. He clearly wished that his son should have the £2000, and it is only the doctrine of this Court that says he shall not. Therefore, although I am obliged to allow the demurrer, I do so with regret, because I feel I am deciding in direct contravention of what I believe to be the testator's intention.

Upon these grounds the demurrer must be allowed.

The VICE-CHANCELLOR having prefaced the order with the words, "The Court being of opinion that the legacy is specific allow the demurrer:"

The Registrar raised an objection that that was not in the usual form.

The VICE-CHANCELLOR said he had used that form before, and he believed that other Judges had done the same. He therefore adhered to the form of order, it being desirable to express the ground of the decision, though, as a general rule, it was not done.

Solicitors for all Parties: Messrs. *Symes, Sandilands, & Humphry.*

(1) 6 Sim. 93.

Followed. *Re* NOAD (*decd.*). [1951] 1 All E.R. 467.

V.-C. M.

1871

Jan. 19; *Feb.* 14.

REED *v.* BRAITHWAITE.

Will—Construction—Gift over—Failure of Condition—Words "and" "or."

A testator gave his residuary estate to his wife for life, and afterwards to his cousin *H.* for her sole use; and should she have any legal issue by marriage, to be divided amongst them equally at twenty-one. "Should the said *H.* not survive my wife, and die without the said legal issue by marriage," he gave his residuary estate to *M.*

H. survived the testator's wife, but had no children:—

Held, that the words "not survive" must be construed as equivalent to "die in the lifetime of," and that the gift over could only take effect on the death of *H.*, without children, in the lifetime of the testator's widow, which event not having happened, it failed.

Grey v. *Pearson* (1) and *Brownsword* v. *Edwards* (2) considered.

THIS was a demurrer raising a question of construction upon the will of *Edward Peter Halse*, which was dated the 23rd of April, 1856; and after making some specific bequests to the testator's wife, continued in the following words:—

"And further, I bequeath unto her (referring to his wife) the interest of all moneys invested in whatever securities they may be at the time of my death, together with all rents arising from leaseholds, or freehold, or freeholds I may be possessed of at the time of my death, or that I may be legally entitled to after my death, for her own use, until the time of her death; and then I will and bequeath all the residue unto my cousin, *Maria Ann Halse*, the daughter of my late uncle, *Thomas Halse*, the interest of which shall, with all rents arising from leaseholds, or freehold, or freeholds, be appropriated for her sole benefit, and not subject to any of her husband's debts, either at the time of her marriage or at any time, but solely for her own use and benefit; and should she have any legal issue by marriage, then after her death the said residue to be divided amongst them equally, share and share alike, when they attain the age of twenty-one years. Should the said *Maria Ann Halse* not survive my wife, *Emmeline Watson Halse*, and die without the said legal issue by marriage, I then will and bequeath all the said sum or sums of moneys invested in the *Bank*

(1) 6 H. L. C. 61. (2) 2 Ves. Sen. 243.

of England, railway shares, bonds, or other securities, together with all leaseholds, freehold, or freeholds, unto my goddaughter *Mary Ann Vaughan Morgan*, for her sole benefit and use."

The testator died on the 7th of August, 1858, leaving his wife and *Maria Ann Halse*, and *Mary Ann Vaughan Morgan*, all surviving him.

The testator's widow died on the 28th of February, 1863. *Mary Ann Vaughan Morgan* became the wife of *William Reed*, and *Maria Ann Halse* married *William Francis;* but though she had been married for several years she had never had any children. She had been in the receipt of the residuary real and personal estate since the death of the testator's widow.

The bill was filed by Mr. and Mrs. *Reed*, and prayed that the trusts of the will might be administered and the property secured in Court, on the assumption that on the death of Mrs. *Francis* the gift over to Mrs. *Reed* would take effect. Mrs. *Francis* demurred.

Mr. *Cotton*, Q.C., and Mr. *Cozens-Hardy*, for the demurrer:—

This is a gift in terms absolute, in the first instance, in favour of Mrs. *Francis*, but subject to defeasance if she had issue, in which case there was a substitutionary gift to such issue. The gift over only takes effect in case of the death of Mrs. *Francis* without issue in the lifetime of the testator's widow, and as she has survived it is impossible that it can take effect, and consequently Mrs. *Reed* has no interest to entitle her to maintain the suit, and the demurrer ought to be allowed.

Mr. *Pearson*, Q.C., and Mr. *Hemming*, for the Plaintiff:—

The words "not survive" are not necessarily equivalent to "die in the lifetime," and unless that substitution is made there is no necessity to substitute "or" for "and" in order to construe the will. So that the case is not concluded by *Grey* v. *Pearson* (1), which overruled *Brownsword* v. *Edwards* (2) only on the question of such a substitution. But such a substitution was not necessary in *Brownsword* v. *Edwards*, as was pointed out by *Parke*, B., in *Mortimer* v. *Hartley* (3), in delivering the judgment of the Court

(1) 6 H. L. C. 61. (2) 2 Ves. Sen. 243.
(3) 3 De G. & Sm. 330, n.

V.-C. M. 1871 REED v. BRAITHWAITE.

of Exchequer. Apart from authority, the intention is plain to make the gift over take effect on the death of Mrs. *Francis* without issue at any time, and that intention may be carried out by a construction both rational and grammatical, without any substitution or addition of words. There is a positive gift to the issue of Mrs. *Francis* in any event, and a gift over in certain events, which is in remainder, and not in defeasance, and consequently could not affect any interests of the children. The gift over could not take place if there were children in existence. The words "die without such legal issue" thus refer to another alternative, in which the time of the death is not limited. The words of the will are consequently sufficient to support two alternatives without any resort to substitution. But if it is necessary to make any substitution or addition, that might be much more easily done here than in many previous cases, where the actual intention has been clear: *In re Thomson's Trusts* (1); *Surtees* v. *Hopkinson* (2). In *Hutton* v. *Simpson* (3), one mode of failure of a gift was expressed, and the Court read it as if all other modes of failure had been also expressed. *Luxford* v. *Cheeke* (4) and *Pearsall* v. *Simpson* (5) were similar cases. Applying this principle, the words "if she shall not survive" mean simply "subject to the life estate," and the words should she "die without issue" mean "subject to the interest of the children," so that the gift is to Mrs. *Reed* subject to the life estate of Mrs. *Francis*, and the gift to her children.

Mr. *Cotton*, in reply:—

To make out two contingencies would be to frame an entirely new will. The settled rule now is, that expressions of this kind are to be construed according to their strict literal meaning. It is impossible to distinguish this case from *Grey* v. *Pearson* (6). In *Brownsword* v. *Edwards* (7) the gift over was necessarily a remainder, for the previous limitations made an estate tail, which is not the case here. *Doe* v. *Jessep* (8) could not stand together with *Brownsword* v. *Edwards;* and *Doe* v. *Jessep* was followed in *Grey*

(1) Law Rep. 11 Eq. 146.
(2) Ibid. 4 Eq. 98.
(3) 2 Vern. 722.
(4) 3 Lev. 125.
(5) 15 Ves. 29.
(6) 6 H. L. C. 61.
(7) 2 Ves. Sen. 243.
(8) 12 East, 288.

v. *Pearson* (1), which latter has been followed by the Master of the Rolls in *Seccombe* v. *Edwards* (2).

Feb. 14. SIR R. MALINS, V.C., after reading the clause in the will above set out, and shortly referring to the facts stated in the bill, and observing that he was of opinion that the words "legal issue by marriage" clearly meant "children," continued:—

The meaning of the clause creating the gift over is, "Should *Maria Ann Halse* die in the lifetime of my wife, and without such issue;" that is, "children who should attain twenty-one." She has survived the wife; and the question is, whether the gift over to the Plaintiff can now take effect.

It is most improbable that the testator should intend the gift over to take effect if *Maria Ann* should die without issue immediately before the testator's widow, but not if she should die immediately after her. It is therefore highly probable that the intention of the testator would be effectuated by reading the will as Mr. *Pearson* and Mr. *Hemming*, for the Plaintiff, contended it should be read, in conformity with the rule laid down by Lord *Hardwicke* in *Brownsword* v. *Edwards* (3), so as to make the dying without issue go through the whole, and so make the gift over take effect whenever *Maria Ann* should die without issue. But though the rule laid down by Lord *Hardwicke* was followed by the Court of Exchequer, and by the Vice-Chancellor *Knight Bruce* in *Mortimer* v. *Hartley* (4), it was formally overruled by the House of Lords in *Grey* v. *Pearson*. In *Brownsword* v. *Edwards* the devise was to trustees, to receive the rents till *John Brownsword* should attain twenty-one; and if he should live to attain the said age of twenty-one, or have issue, then to the said *John Brownsword* and the heirs of his body; but if he should die before the age of twenty-one and without issue, to *Sarah Brownsword*, his sister in tail. Lord *Hardwicke* said that the intention was to make the gift over take effect if *John* should die without issue, and he therefore rejected the words "should attain twenty-one," and so made the words

(1) 6 H. L. C. 91. (2) 28 Beav. 440. (3) 2 Ves. Sen. 243.
(4) 6 C. B. 819; 6 Ex. 47; 3 De G. & Sm. 316.

V.-C. M. 1871 REED v. BRAITHWAITE.

"without issue" run through the whole; and therefore, although *John* died without issue afterwards, the gift over took effect. Now that, I venture to say, was received by the profession as a sound rule of construction, certainly for a quarter of a century, while I was at the Bar. The opposite decision of *Doe* v. *Jessep* (1) was equally regarded as unsound, but the result of *Grey* v. *Pearson* (2) was to set up *Doe* v. *Jessep* and overrule *Brownsword* v. *Edwards* (3).

The effect of the devise in *Grey* v. *Pearson* is precisely the same as that in *Brownsword* v. *Edwards*. It was "in trust for my grandson *Robert Watson* and the heirs of his body; but in case he shall die under the age of twenty-one years, and without issue, in trust for my granddaughter *Ann Watson* and the heirs of her body." So that in both cases the question turned upon the words "die without issue."

Now, to shew that the decision in *Brownsword* v. *Edwards* was formally overruled, I will read a few passages from *Grey* v. *Pearson*. It is remarkable that only four Judges gave an opinion upon the case. First, the Vice-Chancellor *Turner* decided the case in opposition to the view of the House of Lords. Then Lord *Cranworth*, as Lord Chancellor, overruled that view; and in the House of Lords, Lord *Cranworth* adhered to his opinion, and, Lord *Wensleydale* concurring with him, they confirmed the decision of the Lord Chancellor in opposition to the opinion of Lord *St. Leonards*, who gave a most vigorous and determined opinion in favour of the decision of Lord *Hardwicke* in *Brownsword* v. *Edwards*.

Lord *Cranworth* says (4): "When this case came before me by way of appeal, it appeared to me that either *Doe* v. *Jessep* overruled *Brownsword* v. *Edwards*, or that, if not, it was by reason of there being some distinction, which same distinction exists in the present case. I thought the rule laid down in *Doe* v. *Jessep* a much more sensible and convenient rule than that in *Brownsword* v. *Edwards*, and I acted upon it. Though I have since considered the case in every point of view, and have looked to see how far subsequent authorities have at all shaken this decision, I cannot come to any other conclusion than that the decision at

(1) 12 East, 288.
(2) 6 H. L. C. 61.
(3) 2 Ves. Sen. 243.
(4) 6 H. L. C. 85.

which I arrived is the safe and correct conclusion." Then he comments on *Mortimer* v. *Hartley* (1), and then he formally overrules *Brownsword* v. *Edwards* (2). Lord *Wensleydale* also says (3): "The observation sometimes made on this case, that Lord *Hardwicke* read 'or' for 'and,' is not correct, and this is pointed out and explained in the case of *Mortimer* v. *Hartley*. If he had done so, he would have deprived the son's issue of the estate in case the son had died before twenty-one with issue, which would have been a strong objection to that construction; for in construing wills, the events which might possibly have happened, as well as those which did happen, are to be considered. The decision, however, is not open to this objection, for this, as has been already stated, is obviated by putting the somewhat forced construction on the words which Lord *Hardwicke* adopted. Upon fully considering that case, I think it may be well doubted whether the true construction of the words was not, after all, the natural and ordinary one, viz., that if the son should attain twenty-one or have issue, then he should have an estate tail; but that, on the other hand, if he died under twenty-one, and had no issue, the estate should go to the daughter. This is the simple and natural meaning of the words. There was nothing in the least unreasonable in it, and it was unnecessary to recur to the very unusual construction adopted by Lord *Hardwicke*. But be this as it may, this case has not been followed by any uniform course of other decisions, so as to make it, upon the principle above explained, binding upon us in the construction of similar words in this will. On the contrary, it is directly impugned by that of *Doe* v. *Jessep* (4), where the natural and ordinary sense of the same words was adopted." Then he comments upon that decision, and adheres to the rule which is applicable to the present case, and which he had previously (5) stated as follows: "I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in *Westminster Hall*, that, in construing wills, and, indeed, statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity

(1) 6 C. B. 819; 6 Ex. 49; 3 De G. & Sm. 316.
(2) 2 Ves. Sen. 243.
(3) 6 H. L. C. 109.
(4) 12 East, 288.
(5) 6 H. L. C. 106.

V.-C. M. 1871 REED v. BRAITHWAITE.

or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no farther. This is laid down by Mr. Justice *Burton* in a very excellent opinion, which is to be found in the case of *Warburton* v. *Loveland* (1)." Lord *St. Leonards* states, in giving his judgment, that he had adopted a course, unusual with him, of putting his judgment in writing. The judgment given is very distinct and admirable; and, upon grounds, in my opinion, most reasonable, he prefers *Brownsword* v. *Edwards* (2) to *Doe* v. *Jessep* (3). I therefore regret that the opinion of that distinguished lawyer did not prevail; but, however my opinion may coincide with his, I am bound by the decision of the majority, which is the judgment of the House, and the result of that judgment is to reverse the decision of Lord *Hardwicke* in *Brownsword* v. *Edwards*, and set up that of *Doe* v. *Jessep*, which must now be considered the leading authority on this subject. *Doe* v. *Jessep* was a general devise to trustees, on trust for *John Jessep* and the heirs of his body, and if he died before attaining twenty-one, and without issue, over. He attained twenty-one, and then died without issue. Lord *Ellenborough* could only distinguish the case from *Brownsword* v. *Edwards* by the fact that in the latter case the limitation over was to a daughter, while in *Doe* v. *Jessep* it was to other relatives.

A similar point arose before the Master of the Rolls in *Seccombe* v. *Edwards* (4), where the gift was to the children of the testator's sister: "And should one or more of them decease before marriage and leave no issue," his share was given over to the others. *Robert*, one of them, married, but died without children, and it was held that the gift over of his share failed. Lord *Romilly* says (5): "Certainly, if *Brownsword* v. *Edwards*, *Maberly* v. *Strode* (6), and *Bell* v. *Phyn* (7) are to be considered as binding authorities here, the gift over takes effect, and it must be held that the true meaning of this sentence is disjunctive, and not conjunctive.

(1) 1 Huds. & Br. (Ir.) 648.
(2) 2 Ves. Sen. 243.
(3) 12 East, 288.
(4) 28 Beav. 440.
(5) Ibid. 443.
(6) 3 Ves. 450.
(7) 7 Ves. 453.

On the other hand, the cases of *Doe* v. *Jessep* (1), *Pearson* v. *Rutter* (2), and *Grey* v. *Pearson* (3), are relied on as establishing a contrary doctrine. I have very anxiously considered them, but I do not see how these cases can stand together. I regret very much the alteration of the current of judicial decision, for I consider it a matter of very great importance that the law should be settled, and that there should be fixed rules of construction, and that particular words should not be allowed to have a different construction according to the peculiar opinions of the generation in which the decision takes place." Then, having made some comments upon the inconvenience, he proceeds thus: "In common conversation the word 'or' is frequently used for 'and,' and the word 'and' for 'or.' Lord *Hardwicke*, in cases like the present, thought that the word 'and' ought to be read disjunctively; and accordingly, before the case of *Doe* v. *Jessep*, it was considered that this point had been settled by the authority of Lord *Hardwicke*. Lord *Ellenborough*, after Lord *Hardwicke's* decision had been acted upon for half a century, differed from it, and from that time the decisions have fluctuated. Some of the Courts followed one and some followed the other decision, until the House of Lords was referred to to settle the question. In the latest decision cited, namely, *Grey* v. *Pearson*, the House of Lords seems to me to have settled this point, and to have determined that *Doe* v. *Jessep* is to be followed, and the cases of Lord *Hardwicke*, Sir *W. Grant*, and Lord *Loughborough* rejected. I consider myself bound by the decision of the House of Lords, which appears to me to govern this case precisely, for I cannot distinguish between *Grey* v. *Pearson* and the present case. The words in the former were these: 'But subject to the trusts aforesaid, all the said premises hereinbefore devised shall be in trust for my grandson *Robert Watson* and the heirs of his body; but in case he shall die under the age of twenty-one years and without issue, my messuages,' &c., 'shall be in trust for my said granddaughter *Ann Watson*, and the heirs of her body.' In the present case the words are, 'should one or more of them decease before marriage, and leave no issue, then their part to the remaining brothers.' It is true that Lord

(1) 12 East, 288.
(2) 3 D. M. & G. 398.
(3) 6 H. L. C. 61.

V.-C. M. 1871 REED v. BRAITHWAITE.

St. Leonards dissented, and delivered a most learned written judgment in support of his view; but the authority of the decision of the House of Lords is binding on me, though I cannot but think that by following it I am disappointing the intention of the testator. This point must, therefore, be considered as settled by the decision of the House of Lords, which I must follow, and hold the gift over did not take effect, because *Robert* has married. I will make a declaration to that effect."

In the present case, as I have pointed out, the gift over is, "Should *Maria Ann Halse* die in the lifetime of my wife without issue"—die without issue she may, because she at present has none; die in the lifetime of the wife she cannot, because she has survived her. I am, therefore, like Lord *Romilly*, bound by the authority of *Grey* v. *Pearson* (1), and must hold, in conformity with that case, that the gift over to the Plaintiff, Mrs. *Reed*, has failed. The demurrer, therefore, must be allowed, but without costs.

Solicitors: Messrs. *Lyne & Holman;* Messrs. *Wadeson & Malleson.*

V.-C. M. 1870 *July* 12, 13, 14, 15, 18. 1871 *Feb.* 28.

HEASMAN *v.* PEARSE.

Will—Remoteness—Trust for Sale and Distribution after Estate tail—Period of Division—Words "Issue"—"Then living"—Leaseholds, Defective reference to—Joint Tenancy or Tenancy in common—Words of Severance and Equality.

Where estates are devised in tail, with remainder to trustees for sale and distribution of the proceeds among a class, the gift of the proceeds is void unless the class must be ascertained within the period allowed by the rule against perpetuities.

The will of *W. G.* contained a direction to the trustees, after the failure of limitations for life and in tail, to sell and pay a share of the proceeds to the children of *A. H.* "then living," and the issue of such as should be then dead, leaving issue, share and share alike, such issue to take no greater share than their parent would have had if living, and to pay another share to *P. J.* for life, with remainder over as to one moiety to the children of *A. H.* "then living," and such other issue as in respect of the first share, and as to the other moiety to the children of *P. J.* "then living":—

Held, that the words "then living" in both clauses relating to the children

---

(1) 6 H. L. C. 61.

of *A. H.* referred to the same class of children, namely, those living at the failure of the prior limitations: but that the same words in the clause relating to the children of *P. J.* referred to the class living at the death of *P. J.*:

Held, also, that the children of *A. H.* took as tenants in common with the classes of issue of deceased children; but that the members of each such class took as joint tenants *inter se*.

Varied 23 L.J. Ch. 275.

WILLIAM GRATWICKE made his will, dated the 3rd of March, 1819, which may be considered as divided into the following clauses:—

1. He devised the residue of his real estate to trustees in fee to the use of his grandson *William Gratwicke Kinleside* for his life, with remainders to the use of his children in tail; and in default of such issue, to the use of his granddaughter *Jemima Elizabeth Kinleside* for her life, with remainder to her children in tail; and in default of such issue, to the use of the trustees in fee, in trust to sell and to divide the moneys arising from the sale into three equal parts or shares.

2. And as to one-third part or share thereof, upon trust that they transfer or pay and divide the same "unto and amongst all and every the children of my said sister *Amy Heasman*, deceased, except my nephew *John Gratwicke Heasman*, who shall be then living, and the issue of such of them as shall be then dead leaving issue, and the issue of my said nephew *John Gratwicke Heasman* except his son *John West Heasman*, share and share alike, but so as the issue of such of the children of my said sister *Amy Heasman* as shall be then dead shall have no greater share than their, his, or her deceased parents would have had if living, and so as the said issue of my said nephew *John Gratwicke Heasman* shall have no greater share than the issue of any other of the children of my said sister *Amy Heasman*, deceased, is directed to have, in case of the decease of their, his, or her parent."

3. And as to another third part or share, to pay the income to his sister *Jane Croker* during her life, and after her decease to divide the same third part or share into moieties, and to transfer, pay, and divide one moiety thereof [here were repeated the words above given between inverted commas], and to pay the income of the other moiety to his sister *Philadelphia Jupp* during her life, and after her decease to transfer, or pay and divide, such last-

V.-C. M. 1870 HEASMAN v. PEARSE.

mentioned moiety unto such persons, and in such manner, as the third part or share next after mentioned and directed to be paid and applied after the decease of the said *Philadelphia Jupp*.

4. As to the remaining third part or share, to pay the income thereof to his sister *Philadelphia Jupp* during her life, and after her decease to transfer, pay, and divide, such third part or share unto and amongst all and every the children of the said *Philadelphia Jupp* who shall be "then living," and the lawful issue of such of her children as shall be then dead, leaving such issue, equally share and share alike, but so as such issue shall have no greater share thereof than such as their, his, or her deceased parent would have had if living.

5. Powers to lease were given to persons in possession, and to trustees during minorities, and a jointuring power to the grandson; and there was a proviso, that persons succeeding to the estates should take the name and arms of the testator.

6. And the testator devised and bequeathed such parts of his hereditaments as were held for lives unto the trustees and their heirs, upon trust to permit and suffer "my said grandson and granddaughter respectively, and such other person or persons as by virtue of this my will shall be entitled to my said real estates when and as they shall severally be in possession of the same, to possess and enjoy such and such parts of my said estates as are held for lives, subject to such powers, provisos, restrictions, and limitations as are hereinbefore expressed and declared of and concerning my said real estates, as far as the rules of law and equity will permit."

7. And as to the residue of his personal estate remaining after divers repairs, the testator bequeathed the same to the same trustees, upon trust to pay the income to his said grandson *William Gratwicke Kinleside* "during his life, and after his decease to transfer, or pay and divide, such residue unto, between, and amongst all and every the children of the said *William Gratwicke Kinleside* who shall be then living, and the lawful issue of such of his children as shall be then dead leaving such issue then living, share and share alike, but so as such issue shall have no greater share thereof than such as their, his, or her deceased parent would have had if living; but in case my said grandson shall die without

having any child or children, or lawful issue of such child or children living at the time of his decease," then upon trust to pay the income to his said granddaughter *Jemima Elizabeth Kinleside* during her life, and after her decease to transfer, pay, and divide the said residue unto, between, and amongst all and every the children of my said granddaughter *Jemima Elizabeth Kinleside* who shall be then living, and the lawful issue of such of her children as shall be then dead leaving issue then living, share and share alike, but so as such issue shall have no greater share thereof than such as their, his, or her deceased parent would have had if living; but in case my said granddaughter shall also die and shall leave no child or children, or lawful issue of such child or children living at the time of her decease, then my will is, and I do hereby direct, that the said residue of my said personal estate shall be paid, applied, and disposed of by my said trustees, or the survivors or survivor of them, his executors or administrators, in such and the same manner, and for such and the same intents and purposes, as the moneys to arise by sale of my said real estates are hereinbefore directed to be paid and applied.

8. After the clauses concerning the appointment of new trustees and the appointment of executors, and the indemnity of trustees, at the end of the will there was this clause:—

"Provided always, and to prevent all doubts which might otherwise possibly arise, I do hereby direct and declare my will to be, that if it shall happen that my real estate shall ever be sold under the limitations or devises hereinbefore contained, and the money thereby arising, and the residue of my personal estate, or any part thereof respectively, shall, under or by virtue of this my will, ever become payable to the issue of my said late sister *Amy Heasman*, deceased, and my sister *Philadelphia Jupp*, or the issue of my nephew *John Gratwicke Heasman* (except his son, *John West Heasman*), or any of them, and any one or more of such issue shall be then dead having left lawful issue, then the issue of such issue as shall be so dead shall have and receive the part or share to which their, his, or her parent would have been entitled to if living."

Amy Heasman died on the 20th of March, 1798; the testator

V.-C. M. 1870 HEASMAN v. PEARSE.

died on the 21st of August, 1821; *Jane Croker* died on the 13th of December, 1821; *Philadelphia Jupp* died on the 25th of February, 1832; *William Gratwicke Kinleside* died on the 5th of December, 1862, a bachelor.

Jemima Elizabeth Kinleside married Dr. *Archdell*, who took the name of *Gratwicke*, and she died on the 26th of September, 1867, without having had issue. *Amy Heasman* and *Philadelphia Jupp* had numerous descendants, and questions arising as to which of them were entitled under the will, this suit was instituted to administer the estate of the testator; and on the 22nd of February, 1868, a decree for taking the accounts, sale of the property, and inquiries as to the state of the families, was made, and pursuant thereto the Chief Clerk made his certificate, dated the 5th of March, 1870, by which it appeared:

1. That *Amy Heasman* (besides children who died unmarried before the date of testator's will) had two children, namely, *John Gratwicke Heasman*, and *Amy*, the wife of *Richard Newland*.

2. That *John Gratwicke Heasman* died in 1850, and (besides his son, *John West Heasman*, excluded by the will, and besides children who died unmarried before the date of the testator's will) had two daughters, *Mary Heasman*, now living, and *Frances Heasman*, who died in 1861 without having been married.

3. That *Amy Newland* died in 1825, and (besides children who died without being married before the date of the testator's will) she had had the following children: three who survived her, viz., *William*, who died unmarried in 1839; *Francis Rudwick*, who died in 1850, leaving issue; *Thomas*, who died in 1845, leaving issue; *Mary Corney*, who died in 1861, without leaving issue; and other children, one who died before the date of the testator's will, and another who died in the testator's lifetime, both of whom left issue, who or whose issue were still living.

4. That *Philadelphia Jupp* (besides children who died in the lifetime of testator without being married) had issue three children, two who survived her, viz., *Charlotte Holmes* and *William Jupp*, and one, viz., *George Spencer Jupp*, who died in her lifetime, in 1819, leaving children who survived him, some of whom were dead and some still living.

The cause now came on for further consideration.

Mr. *Shapter*, Q.C., and Mr. *Stallard*, for the Plaintiff *Mary Heasman*, the only surviving child of *John Gratwicke Heasman*:—

Mary Heasman is entitled to one-fourth of the whole property.

First: As to the third of the proceeds of sale of the freeholds, the subject of clause 2. The words "then living" and "then dead" refer to the period of sale, which was to take place on the 26th of September, 1867, when the prior limitations failed.

The word "issue," by reference to the word "parent," means "children": *Sibley* v. *Perry* (1); *Maynard* v. *Wright* (2); *Martin* v. *Holgate* (3). Such issue took as joint tenants: *Bridge* v. *Yates* (4); *Coe* v. *Biggs* (5); *Lanphier* v. *Buck* (6). Therefore, *Mary Heasman* and *Frances Heasman* took one-half of this third as joint tenants; and *Frances* having died without severance, *Mary Heasman* was entitled to it.

Secondly: As to a moiety of the second third given to *Jane Croker* for life, the subject of clause 3. The words "then living," in the gift over of the first moiety of this third, have the same meaning as in the gift of the first third, which it embodies: *Coventry* v. *Coventry* (7); *Bateman* v. *Gray* (8); *Carver* v. *Beaver* (9). Consequently, *Mary Heasman* takes a half of this third.

Thirdly: As to the leaseholds for lives, they were in all respects to follow all the limitations and trusts of the real estate: *Ross* v. *Ross* (10); *Minton* v. *Kirwood* (11); *Ord* v. *Ord* (12); *Houstoun* v. *Houstoun* (13).

Fourthly: So, also, as to the residuary personal estate.

Mr. *De Gex*, Q.C., and Mr. *Horton Smith*, for assignees of the Plaintiff *Mary Heasman*, supported the Plaintiff's view of the case.

Mr. *Kay*, Q.C., and Mr. *Shebbeare*, for the administrator of *Mary Corney*, adopted the Plaintiff's argument, and added, that issue should survive the parent by reason of the word "living."

There was no necessity to survive the tenant for life, or period of

(1) 7 Ves. 522.
(2) 26 Beav. 285.
(3) Law Rep. 1 H. L. 175.
(4) 12 Sim. 645.
(5) 1 N. R. 536.
(6) 2 Dr. & Sm. 484.
(7) 2 Dr. & Sm. 470.
(8) 29 Beav. 447.
(9) Ibid. 449, n.
(10) 2 Coll. 269.
(11) Law Rep. 3 Ch. 614.
(12) Ibid. 2 Eq. 393.
(13) 4 Sim. 611.

V.-C. M. 1870 HEASMAN v. PEARSE.

distribution: *Barker* v. *Barker* (1); *Re Wildman's Trusts* (2); *Martin* v. *Holgate* (3); *In re Orton's Trusts* (4); *In re Potter's Trusts* (5); *M'Gregor* v. *M'Gregor* (6); *In re Hodgson's Trusts* (7); *Penny* v. *Clarke* (8). *Mary Corney*, having survived her brothers and sisters, was entitled to one-fourth of the whole fund.

The explanatory clause (No. 8) at the end of the will did not divest *Mary Corney's* share. That clause was meant to affect the issue of *John Gratwicke Heasman* only.

Mr. *Renshaw*, and Mr. *Tooke*, for the personal representatives of *Charlotte Holmes*, all in the same interest.

Mr. *Bristowe*, Q.C., and Mr. *H. T. W. Greene*, for the personal representative of *William Jupp*, cited *Stanley* v. *Wise* (9).

Mr. *Glasse*, Q.C., and Mr. *C. Hall*, for the personal representatives of *George Spencer Jupp*:—

"Then living" and "then dead," in the disposition of the third (clause 4), refers to the death of *Philadelphia Jupp*: *Archer* v. *Jegon* (10); *Martin* v. *Holgate*. That construction is not affected by the explanatory clause: *Jarman* on Wills (11); *Slingsby* v. *Grainger* (12); *Britnell* v. *Walton*, before your Honour on Nov. 22, 1869.

The result is, one-sixth of the whole estate goes to the personal representative of *Charlotte Holmes*, another one-sixth to the personal representative of *William Jupp*, and another one-sixth to the personal representative of *George Spencer Jupp*.

As to the leaseholds, the trustees were to hold them on trust for the persons enjoying the freeholds.

That could not exclude the trustees themselves taking, on failure of prior limitations. The words, "subject to such former provisos, restrictions, and limitations as are hereinbefore expressed and declared of and concerning my said real estates," in clause 6, referred to the powers of leaving, jointuring, and proviso to take name and arms in clause 5.

(1) 5 De G. & Sm. 753.
(2) 1 J. & H. 299.
(3) Law Rep. 1 H. L. 175.
(4) Ibid. 3 Eq. 375.
(5) Ibid. 8 Eq. 52.
(6) 1 D. F. & J. 63.
(7) 1 K. & J. 178.
(8) 1 D. F. & J. 425.
(9) 1 Cox, 432.
(10) 8 Sim. 446.
(11) 3rd Ed. vol. i. p. 487.
(12) 7 H. L. C. 273.

The words, "as long as the rules of law and equity will permit," in clause 6, are of no force: *Lord Scarsdale* v. *Curzon* (1).

Mr. *Mackeson*, Q.C., and Mr. *Daly*, for the representatives of the Defendant *Charles Rudwick*, deceased, and *Newland Rudwick*, and *Emily Johnson* in the same interest:—

The period of sale, and not the death of *Philadelphia Jupp*, is the time for ascertaining the class of her children then living and the children of those then dead in clause 4: *Gaskell* v. *Holmes* (2); *Hetherington* v. *Oakman* (3); *Cain* v. *Teare* (4); *Howard* v. *Collins* (5).

Mr. *Cotton*, Q.C., and Mr. *Everitt*, for grandchildren of the brothers of *Mary Corney* who died in her lifetime leaving issue, and for issue of the *Jupps* similarly circumstanced:—

The word "issue," in clause 8, does not mean children. Grandchildren in the *Jupp* line may take, though great grandchildren in the *Newland* line cannot take. Issue, however remote, can take at the period of distribution. The eldest in the line is to take. The onus is on those who cut down issue to children.

The testator has expressed himself against the rule in *Martin* v. *Holgate* (6), and declared that issue must survive the period of distribution.

Deceased parent, in clause 2, is the only term for cutting down issue to child. But that is satisfied by limiting the claim of each successive *stirps*.

Remote issue may take, but not to compete with nearer issue: *Ross* v. *Ross* (7). All issue, however remote, take, excluding those who are dead (leaving issue or not), and excluding those who are represented by nearer issue.

Mr. *Osborne*, Q.C., and Mr. *Swan*; Mr. *Pearson*, Q.C., and Mr. *Ward*; Mr. *Cole*, Q.C., and Mr. *Miller*; Mr. *Bristowe*, Q.C., and Mr. *H. T. W. Greene*; Mr. *Morgan*, Q.C., and Mr. *Speed*; Mr. *W. Karslake*, Mr. *Graham Hastings*, Mr. *Haddan*, Mr. *Osler*, Mr. *Davey*, Mr. *Rendall*, Mr. *Taylor*, and Mr. *Fellowes*, appeared for different parties interested.

(1) 1 J. & H. 40.
(2) 3 Hare, 438.
(3) 2 Y. & C. Ch. 299.
(4) 4 Moo. P. C. 249.
(5) Law Rep. 5 Eq. 349.
(6) Ibid. 1 H. L. 175.
(7) 20 Beav. 645.

V.-C. M. 1870 HEASMAN v. PEARSE.

Some argued as to the word "leaving": *Crause* v. *Cooper* (1); *In re Merrick's Trusts* (2); *In re Watson's Trusts* (3). Others argued that there was tenancy in common between the members of the class of issue: *Hodges* v. *Grant* (4); *Perry* v. *Woods* (5); *Lyon* v. *Coward* (6); *Harcourt* v. *Harcourt* (7); *Sheppersdon* v. *Dale* (8): and that taking at different times was against joint tenancy: *Ruck* v. *Barwise* (9); and others argued that issue must be alive at the period of distribution: *Robinson* v. *Sykes* (10); *Ross* v. *Ross* (11); *In re Potter's Trusts* (12); *Habergham* v. *Ridehalgh* (13); *In re Hotchkiss' Trusts* (14).

Mr. *Shapter*, in reply:—

As to joint tenancy, or tenancy in common, the case of *Perry* v. *Woods* is a mere decision that share and share alike were words of severance creating tenancy in common. There is nothing about classes.

Stanley v. *Wise* (15) is only a decision that you may give to several tenants in common in unequal shares.

Where there are words of equality, as in equal shares, or share and share alike, it is plain that there is no application to persons taking unequal shares; and that where the gift is equally, or share and share alike, between children and issue of deceased children, the issue to take parents' share, "equally" applies to *stirpes* only: *Bridge* v. *Yates* (16). If the words of equality are repeated so as to apply first to *stirpes*, and then to individuals of each *stirps*, then issue take in common *inter se*: *Lyon* v. *Coward*; so if the words of equality are made to apply to issue as well as to children, as in the case of a bequest to children and issue of deceased children, equally to be divided between such children and issue, but issue to take parents' share.

Harcourt v. *Harcourt* is *contrà* to *Bridge* v. *Yates*, but Vice-

(1) 1 J. & H. 207.
(2) Law Rep. 1 Eq. 551.
(3) Ibid. 10 Eq. 36.
(4) Ibid. 4 Eq. 140.
(5) 3 Ves. 204.
(6) 15 Sim. 287.
(7) 26 L. J. (Ch.) 536.
(8) 12 Jur. (N.S.) 156.
(9) 2 Dr. & Sm. 510.
(10) 23 Beav. 40.
(11) 20 Ibid. 645.
(12) Law Rep. 8 Eq. 52.
(13) Ibid. 9 Eq. 395.
(14) Ibid. 8 Eq. 643.
(15) 1 Cox, 432.
(16) 12 Sim. 645.

Chancellor *Kindersley* overruled that case himself by *Lanphier* v. *Buck* (1). *Sheppersdon* v. *Dale* (2) is also *contrà*. V.-C. M. 1870 HEASMAN v. PEARSE.

Penny v. *Clarke* (3) went to the opposite extreme, and held that issue took as joint tenants where there were words of severance, and no words of equality. *Ruck* v. *Barwise* (4) shews that there may be joint tenancy, though the parties take at different times.

Feb. 28. SIR R. MALINS, V.C.:— 1871

The object of this suit is to ascertain the rights of the persons beneficially interested under the will of the late *William Gratwicke*, who died seised of considerable property, in August, 1821. The testator had had an only daughter, who died in 1798, leaving a son, *William Gratwicke Kinleside*, and a daughter, *Jemima Kinleside*, whose husband, Dr. *Archdell*, took the name of *Gratwicke*. He had also three sisters, *Amy Heasman*, who died in his lifetime, leaving a son and a daughter; *Jane Croker*, who died unmarried very shortly after the testator; and *Philadelphia Jupp*, who died after the testator, leaving one son and one daughter surviving her. [The Vice-Chancellor then stated the various clauses in the will, and continued:—] It will be seen by this will that the testator, in the first instance, gave his estates to his grandson, *William Gratwicke Kinleside*, for life, with remainder to all his issue in tail by purchase; remainder to his granddaughter, *Jemima Kinleside* (afterwards *Gratwicke*), for life, with remainder to all her issue by purchase; and in default of such issue, the estate is given to trustees for sale. The estates, therefore, which precede the devise upon trust to sell, might have lasted for generations in contemplation of law, because the law never takes notice of the fact that an estate tail may be barred.

After the death of the testator, his grandson, *W. G. Kinleside*, entered into possession of the estates; and upon his death, without issue, in 1862, that is, at the expiration of a period of forty-one years, the granddaughter, Mrs. *Gratwicke*, succeeded to the possession of the estates as tenant for life. She died without issue, in

(1) 2 Dr. & Sm. 484.
(2) 12 Jur. (N.S.) 156.
(3) 1 D. F. & J. 425. 6 Jur NS. 307.
(4) 2 Dr. & Sm. 510.

V.-C. M. 1871 HEASMAN v. PEARSE.

September, 1867, and the estates then became saleable under the trusts for sale. They have now been sold for a large sum of money —about £150,000—and I have to decide who is entitled to that money.

The testator's two sisters, *Jane Croker* and *Philadelphia Jupp*, as I have stated, survived him, but both of them died shortly afterwards. Upon the death of *Jane Croker*, the one-third of the produce of the estates, of which she was made tenant for life, went over, as to one moiety of it, to the family of the sister *Amy Heasman;* and as to the other moiety, to *Philadelphia Jupp* and her family. The result, therefore, is that one moiety of the whole produce of the estate belongs to the family of *Amy Heasman*, and the other moiety to the family of *Philadelphia Jupp*. The great difficulty in the cause is to determine what members of the family are entitled, and in what proportions. The descendants of the two sisters are very numerous, and many conflicting claims to the property have been ably urged on their behalf, and I think I am not wrong in saying that more counsel were engaged in this cause than in any cause of late years, and I have heard some of them several times on different points. This was the necessary result of the numerous conflicting claims, and I do not in the slightest degree complain of it, but that fact has certainly not diminished my difficulties in arriving at a satisfactory conclusion as to the proper construction of the will.

At the death of the testator there were only one son and one daughter of his sister *Amy Heasman* living, namely, the nephew, *J. Gratwicke Heasman*, and *Amy Newland*, who died in 1825, leaving several children, whose descendants are very numerous. The nephew, *J. G. Heasman*, died in 1850, having had many children, some of whom died in his lifetime and some survived him; and their descendants are also very numerous. The sister, *Philadelphia Jupp*, left one son, *William Jupp*, and one daughter, *Charlotte Holmes*, surviving her; and one son, *George Spencer Jupp*, died in her lifetime, and in the lifetime of the testator, but after the date of his will, namely, in December, 1819, leaving several children and more remote descendants, all or most of whom claim an interest in the property. The first question which arises upon this will is, as to the effect of the clause, which is a sort of divesting

clause, and is very important. The testator says [clause 8]: "I do hereby direct and declare my will, that if it shall happen that my real estate shall ever be sold under the limitations or devises hereinbefore contained, and the money thereby arising, and the residue of my personal estate, or any part thereof respectively, shall, under or by virtue of this my will, ever become payable to the issue of my said late sister *Amy Heasman*, deceased, and my sister *Philadelphia Jupp*, or the issue of my nephew *John Gratwicke Heasman* (except his son, *John West Heasman*), or any of them, and any one or more of such issue as shall be then dead having left lawful issue, then the issue of such issue as shall be dead shall have or receive the part or share to which his or her parent would have been entitled if living." According to the original bequest, there is no divesting of the gifts to parents in favour of issue beyond the first degree or children; the children are to take the shares which the parents would have taken; but it is contended, on behalf of the grandchildren and more remote descendants of the original takers, that this clause operates so as to divest the interests of parents in favour of their children from time to time, so as to substitute living issue for dead parents as long as the estates for life or estates tail, which precede the trust for sale, may endure. Now, this clause is either a mere repetition of the divesting clause in favour of the family of *Philadelphia Jupp*, or it is a distinct and independent divesting clause; and if it be the latter, its object is to divest the interest of every successive person who falls within the line of the issue described, as often as such person shall die leaving issue, in favour of such issue, as long as the estates tail limited to the sons and daughters of the grandson and granddaughter last. In this view of the case it might go on for generations, and might, if valid, operate as a gift to the issue of unborn issue for generations to come, and would thus be void under the rule against perpetuities.

But it is urged that, the gift being after estates tail, it is relieved from this objection; but I think every limitation after an estate tail must be good in itself, unless it be by way of contingent remainder, which must then take effect during the continuance of the estate tail, or at the moment of its determination: thus, a devise in fee to the first unborn son of *A.* who shall attain the age

V.-C. M, 1871 HEASMAN v. PEARSE.

of twenty-five years, is void for remoteness; but if it be preceded by an estate tail in *B.*, it is good as a contingent remainder, and will take effect or fail according to the event of *A.* having or not having a son who has attained that age when the estate tail of *B.* determines.

In the present case the trust for sale of the land is free from all objection, because it is the trust of a vested fee simple in remainder in the trustees immediately expectant upon a series of estates tail, which, if they take effect, will enable the tenants in tail to bar the estate, which is given upon trust to sell, and if the estates tail fail—as in the event they did—the fee is immediately expectant upon life estates; but I can see no ground which can exempt the trusts affecting the money to be produced by the sale from the rule which requires that the interests shall be absolutely vested in some person or persons within a life in being at the death of the testator and twenty-one years afterwards. It is not desirable to extend the rules for suspending the vesting of property; and as this is a mere gift of money to arise from the sale of land, which might have come into operation immediately on the death of the testator by the deaths of the two tenants for life in his lifetime without issue, I think it much better to apply the ordinary rules, which enable the parties to ascertain in whom the property is vested, or in whom it may vest immediately after the death of the testator. I may refer to the thirty-second chapter in the late Mr. *Lewis's* able Treatise on the Law of Perpetuities, and particularly to the cases of *Hartopp* v. *Lord Carbery* (1) and *Case* v. *Drosier* (2), cited by him as supporting this view. The clause, if intended to have any effect beyond what the testator had said in the original gifts, was intended to operate as long as the estates tail endured, as is shewn by the words, "if my estates shall ever be sold under the limitations hereinbefore contained;" and I do not think it can be severed so as to tie up the property for one generation more, as was argued by some of the learned counsel, which would have had the effect of making it a gift to the issue of unborn issue, it being clear that the ages of the persons upon the death of whom the gift over is to take effect cannot be regarded. *Jee* v. *Audley* (3), and *In re*

(1) Sanders on Uses, p. 197. (2) 2 Keen, 764. (3) 1 Cox, 324.

Sayer's Trusts (1), in which I followed *Jee* v. *Audley* (2), were cases of gifts over without issue, of women past the possibility of child-bearing. In *Jee* v. *Audley* it was held that it was impossible to look out of the will, and that the validity of the limitation must depend on its validity as it stood on the face of the will.

On these grounds, I am of opinion that the will must be construed as if the clause in question had been omitted from it, and that the rights will consequently entirely depend upon the original gifts to the two families. What, then, is the effect of those gifts?

[His Honour then read the gift to the children of the testator's sister, *Amy Heasman* [clause 2].]

The moiety of the produce of the estates which goes to the family of *Amy Heasman* is divisible between the brothers and sisters, and the children of those who shall be dead; therefore it can only go in two shares. One share goes to the family of *Amy Newland*, her only surviving daughter; and the other share goes to the family of *J. Gratwicke Heasman*, the only surviving son, a nephew of the testator, and the son of *Amy Heasman*. It is a tenancy in common amongst the children of *Amy Heasman* and their issue, taking in the place of the parents; but I am of opinion that the children who are substituted for the parents take as joint tenants *inter se*, as in *Bridge* v. *Yates* (3), *Penny* v. *Clarke* (4), *M'Gregor* v. *M'Gregor* (5), *Lanphier* v. *Buck* (6), *Coe* v. *Biggs* (7), and *In re Hodgson's Trusts* (8). Those cases were all cited and elaborately commented upon in the argument. I need not go further into them, except by stating that, with regard to the first, *Bridge* v. *Yates*—which, I think, is peculiarly applicable—it was a bequest to a testator's wife for life, and after her decease to be equally divided between all the testator's children who should be then living, and the issue of such of them as should be then dead, each issue taking only the part or share to which his, her, or their deceased parent or parents would have been entitled if living. Sir *Lancelot Shadwell* held that there was a tenancy in common among the

(1) Law Rep. 6 Eq. 319.
(2) 1 Cox, 324.
(3) 12 Sim. 645.
(4) 1 D. F. & J. 425.
(5) 1 D. F. & J. 63.
(6) 2 Dr. & Sm. 484.
(7) 1 N. R. 536.
(8) 1 K. & J. 178.

6 Jun 1871

V.-C. M. 1871 HEASMAN v. PEARSE.

children and their families, but that they took as joint tenants *inter se*. That is the view of Lord Justice *Turner* in *Penny* v. *Clarke* (1); and all the authorities I have mentioned support the same view.

Against this view, *Hodges* v. *Grant* (2) and *Lyon* v. *Coward* (3) were relied on, as shewing that the issue took as tenants in common; but the words of division, which created a tenancy in common, were applied in those cases as well to issue as to their parents, for whom they were substituted, and do not, therefore, apply to this case, in which the words of division, as it appears to me, apply to the original takers only. The consequence is that, as to the moiety of the moiety of the whole fund which goes to the children of *Amy Newland*, the children of *Amy Newland* are substituted for her; they take as joint tenants; and the moiety of the moiety of the whole fund which goes to the children of *Amy Newland* became vested in her surviving child, *Mary Corney*, and in *Mary Corney* only, to whose legal personal representative it now belongs. That is one-fourth of the entire fund.

For the same reason the other moiety of the moiety now belongs to the Plaintiff *Mary Heasman*, as the only surviving child of *J. G. Heasman*. She is the survivor of all those children, and therefore, as surviving joint tenant, takes the whole. That, therefore, disposes of the moiety which went to the family of *Amy Heasman*. It rests in two persons only.

Then as to the moiety of the whole fund, which goes to the family of *Philadelphia Jupp*. The gift to that family is in these words [clause 4]: "The trustees shall pay the annual interest, dividends, and proceeds thereof when and as the same shall become payable and be received, unto my said sister *Philadelphia Jupp* for and during the term of her natural life; and from and immediately after her decease, upon trust to transfer, pay, and divide such last-mentioned third part or share unto and amongst all and every the children of my said sister *Philadelphia Jupp* who shall be then living, and the lawful issue of such of her children as shall be then dead leaving such issue, equally, share and share alike, but so as such issue shall have no greater share thereof than such as their, his, or

(1) 1 D. F. & J. 425. (2) Law Rep. 4 Eq. 140.
(3) 15 Sim. 287.

her deceased parent would have had if living; and in the meantime, and until such sale, to be invested." *Philadelphia Jupp*, who, as I have stated, survived the testator, left a daughter, *Charlotte Gratwicke Holmes*, and her son, *William Jupp*, surviving her; and she also left several children of her deceased son, *George Spencer Jupp*. The words, "who shall be then living," must refer to the period last mentioned, which is the death of *Philadelphia Jupp* herself, as in *Archer* v. *Jegon* (1). That was a bequest to the testator's sister, *Elizabeth Graham*, wife of *John Graham*, for life; remainder to *John Graham*, for his life, and after his decease to the children of his (the testator's) sister, who should be then living. *John Graham* died soon after the testator, leaving a son and four daughters surviving him. *Elizabeth*, the wife, survived him some years. One of the four daughters died in her lifetime, and it was held by Sir *Lancelot Shadwell* that the word "then" necessarily referred to the antecedent "after his decease," and that the daughter who survived the father, but died in the lifetime of the mother, took a share. I decided in the same way in *Britnell* v. *Walton*.

A very elaborate argument was addressed to me on behalf of children of *William Jupp;* but in the view I take of the case, they do not take anything directly, though I suppose the result will be they will take it through the parent, as they must be his next of kin, and I presume the property is divisible among them. The consequence is, that each of the children of *Philadelphia Jupp* who survived her took one-third of the moiety of the property of which she was made tenant for life, and that the remaining one-third vested in the children of *George Spencer Jupp* as joint tenants; and that his three surviving sons—*Spencer Jupp*, *James Jupp*, and *Thomas Gratwicke Jupp*—are now entitled to it in equal shares.

The result, in my opinion, is, that the moiety of the property which goes to the family of the testator's sister *Amy Heasman* belongs to the Plaintiff *Mary Heasman*, and the legal personal representative of *Mary Corney*, deceased, in equal shares; and that the moiety which goes to the family of *Philadelphia Jupp* is divisible into three shares, of which one goes to the legal personal representative of *Charlotte Gratwicke Holmes*, another goes to the

(1) 8 Sim. 446.

V.-C. M. 1871 HEASMAN v. PEARSE.

legal personal representative of *William Jupp*, and the remaining share to the three surviving sons of *George Spencer Jupp*.

With regard to the produce of the leaseholds for lives which are given in these words [clause 5], "I give and bequeath such of my manors, messuages, farms, lands," and so forth, "during all my estate and interest—that is, of the property held for lives—to my grandson and such other person or persons as by virtue of this my will shall be entitled to my said real estates when and as they shall severally be in possession of the same, to possess and enjoy such and such parts of my said estates as are held for lives, subject to such powers provisoes, restrictions, and limitations as are hereinbefore expressed and declared of and concerning my said real estates as far as the rules of law and equity will permit; and my will and meaning is, and I do hereby direct" the trustees to renew leases. With regard to the produce of the leaseholds for lives, I am of opinion that it was the intention of the testator to dispose of it precisely as he had disposed of the produce of the fee simple estates; or, in other words, to unite the enjoyment of the two estates in the same person and persons while they remained *in specie*, and to carry the produce to the same persons when they should be converted into money. And the cases of *Ross* v. *Ross* (1), *Ord* v. *Ord* (2), and *Minton* v. *Kirwood* (3), which were cited by Mr. *Shapter*, shew that the words of the testator are sufficient to carry that intention into effect.

There must be declarations to the effect I have stated, and I suppose all parties here before me must have their costs out of the estate.

Solicitors for the Plaintiffs and several of the Defendants: Messrs. *E. Carleton Holmes & Son.*

Solicitors for the other Defendants: Messrs. *Wood, Street, & Hayter;* Mr. *H. Sowton;* Mr. *A. Edmunds;* Messrs. *Ravenscroft & Hills;* Mr. *R. Walthew;* Messrs. *Desborough & Son;* Messrs. *Makinson & Carpenter.*

(1) 2 Coll. 269. (2) Law Rep. 2 Eq. 393.
(3) Law Rep. 3 Ch. 614.

RYVES *v.* RYVES.

V.-C. M.
1871
March 2.

Will—Joint Tenancy or Tenancy in common—Payment of Testator's Debts.

A testator directed his debts to be paid in the first instance by his executor and executrix. He then gave all the residue of his real and personal estate to his brother and sister, to hold the same unto his said brother and sister, their heirs, executors, administrators, and assigns; but in case his brother died in the lifetime of his sister, without leaving issue, then he gave his share and interest in the property to his sister absolutely, and he appointed his brother and sister executor and executrix of his will. The brother died before the testator, leaving a son, who was the testator's heir-at-law, and the testator's personal estate was not sufficient for payment of his debts:—

Held, that the gift of the residue to the testator's brother and sister was a gift to them as tenants in common, and that the share of the sister and the share of the brother, which had lapsed to the heir-at-law, must bear the debts equally.

THIS was a special case.

The will of *Hugh Massy Ryves*, dated the 22nd of November, 1854, was as follows:—

"In the first place, I direct that all my just debts shall be paid by my executor and executrix, hereinafter named, as soon as conveniently may be after my decease. I give, devise, and bequeath all my undivided third part or share, or other my part, share, and interest of and in certain messuages, farms, lands, tithes, and hereditaments, situate in the county of *Carmarthen*, which came to me on the death of my uncle, the late *W. Horrell*, Esq., and all the residue and remainder of my real estate, and also all my personal estate and effects whatsoever and wheresoever, unto my brother *W. C. L. Ryves* and my sister *Rebecca Ryves*, to hold the same unto my said brother and sister, their heirs, executors, administrators, and assigns. But in case my said brother should die in the lifetime of my said sister without leaving any issue, then I give and devise his share and interest in the property hereinbefore devised unto my said sister, her heirs, executors, administrators, and assigns absolutely; and I appoint my said brother and sister executor and executrix of this my will."

The Plaintiff was *Rebecca Ryves*, the testator's sister. *W. C. L. Ryves*, the brother of the testator, died on the 30th of August,

V.-C. M. 1871 RYVES v. RYVES.

1860, in the lifetime of the testator, leaving issue surviving him two children, namely, his son and heir, the Defendant *H. M. Ryves*, and a daughter, both infants.

The testator died on the 31st of March, 1863, and his will was proved by the Plaintiff.

The Defendant was the heir-at-law of the testator.

The personal estate of the testator was insufficient for the payment of his debts and funeral and testamentary expenses, and the whole of such personal estate was duly applied and expended by the Plaintiff in payment thereof, and there was a deficiency which had been paid by the Plaintiff out of her own moneys.

The questions now submitted for the opinion of the Court were: whether the testator died intestate as to a moiety, or any and what part, of his residuary real estate; and in case he should be held to have so died intestate, whether such part of his real estate as descended upon the infant Defendant as heir-at-law was or was not primarily applicable to the payment of the testator's debts in exoneration of that part to which the Plaintiff was entitled as devisee; or whether, having regard to the charge of debts contained in the will, the debts were or were not charged upon the estate devised to the Plaintiff, and such part as descended upon the infant Defendant as heir, rateably.

Mr. *Glasse*, Q.C., and Mr. *Everitt*, for the Plaintiffs, submitted that the gift in the testator's will constituted a joint tenancy to the brother and sister, and consequently that the Plaintiff, the sister of the testator, became entitled to the whole of the residue, subject to the payment of debts.

Mr. *Cotton*, Q.C., and Mr. *A. Bailey*, for the Defendant, the heir-at-law, contended that the residue was given to the brother and sister as tenants in common. In support of the contention that the debts should be borne in equal proportions by the share of the Plaintiff and the share that had lapsed to the Defendant, they cited *Fisher* v. *Fisher* (1), *Wood* v. *Ordish* (2), and *Peacock* v. *Peacock* (3).

(1) 2 Keen, 610. (2) 3 Sm. & Giff. 125.
(3) 13 W. R. 516.

SIR R. MALINS, V.C.:—

V.-C. M. 1871 RYVES v. RYVES.

If the gift had been simply to the brother and sister of the testator, followed by words of limitation, there would have been no question but that they would have taken as joint tenants; but the testator continues, "in case my said brother should die in the lifetime of my sister without leaving any issue, then I give and devise his share and interest in the property hereinbefore devised unto my sister, her heirs, executors, administrators, and assigns absolutely." We are bound, in construing a will, to consider the whole devise together; and it is clear, from the latter clause, that the sister was not to take as being the surviving joint tenant, but was to take only upon the death of her brother without issue during her lifetime, shewing that the intention was to create a tenancy in common. Then as to the question of payment of debts. In the case of *Peacock* v. *Peacock* (1), where there was a lapsed share of an estate given to five persons as tenants in common, Vice-Chancellor *Wood* said that the point was concluded by authority. The principle was laid down in *Fisher* v. *Fisher* (2), and followed by *Wood* v. *Ordish* (3), that as between the heir-at-law, the next of kin, and the residuary devisees and legatees, a lapsed share of real and personal estate ought to be applied in the same order as if the legatee had survived, and that the heir-at-law took the lapsed share, charged with the payment of a rateable proportion of the debts and legacies. In this case, therefore, I decide in conformity with that authority, that the heir-at-law will take the lapsed share, charged with an equal proportion of the debts.

Solicitors for the Plaintiff: Messrs. *Mead & Daubeny.*
Solicitor for the Defendant: Mr. *E. A. Paterson.*

(1) 13 W. R. 516. (2) 2 Keen, 610. (3) 3 Sm. & Giff. 125.

V.-C. M.
1871
March 22.

CASTLE *v.* FOX.

Will—Construction—Wills Act (1 *Vict. c.* 26), *s.* 24—*After-acquired Property —Evidence to prove Intention.*

A testator devised his mansion and estate, called *Cleeve Court*, with the appurtenances, upon certain trusts, and gave the residue of his property of every description, other than those thereinbefore mentioned, upon other trusts. The testator had contracted, before the date of his will, to purchase an estate near and adjoining to the *Cleeve Court* estate, which was conveyed to him subsequently. He also purchased, after the date of his will, several other small properties adjoining the *Cleeve Court* estate:—

Held, that evidence was admissible to shew what property the testator designated by the particular description up to the time of his death, and that all the property acquired after the date of the will, and treated by the testator immediately before his death as additions to the *Cleeve Court* estate, passed under the particular devise.

Cole v. *Scott* (1) disapproved.

ROBERT CASTLE, of *Cleeve Court*, in the county of *Somerset*, by his will, dated the 14th of March, 1861, gave to his eldest son *Thomas Castle* his manor of *Yatton*, for his own use and benefit absolutely. He then gave and devised his mansion and estate called *Cleeve Court*, with the appurtenances (excluding the manor), to trustees, in trust to permit his wife to have the possession and enjoyment thereof, and the rents, issues, and profits thereof, during her life, and subject thereto in trust for his three sons, *Thomas*, *Edward Walter*, and *Robert Castle*, and their respective heirs, in equal shares as tenants in common, but subject to such right of pre-emption in favour of his son *Thomas Castle* as thereinafter contained. And after other devises and bequests, the testator gave, devised, and bequeathed the residue of his property of every description, other than those thereinbefore mentioned and expressed or intended to be disposed of, to his trustees, their heirs, executors, administrators, and assigns, according to the nature and quality of the same respectively, in trust to pay his debts and the sum of £500 to his wife, and subject thereto to raise the sum of £30,000, to be held by his trustees in trust to pay the income to his wife for life, and afterwards in trust for all his children, including his son *Thomas*, who should be living at his decease, in equal shares,

(1) 1 Mac. & G. 518.

and also to raise the sum of £2000 for each of his children, to be paid to them at twenty-one or marriage.

The testator died on the 3rd of July, 1866, and this suit was instituted for the administration of his estate.

In June, 1859, the testator had purchased the mansion-house of *Cleeve Court*, with about 281 acres of land.

By an agreement, dated the 25th of August, 1859, he contracted to purchase other lands, forming an estate called *Kingswood*, and containing about 158 acres, situate in the parish of *Yatton*, and near or adjoining to those above referred to; and it was provided by the agreement that he should have immediate possession of such lands. The testator accordingly entered into possession of the last-mentioned lands, and at the date and execution of his will he was in the actual occupation thereof.

The *Kingswood* estate was conveyed to the testator in fee, by an indenture dated the 31st of December, 1861.

Subsequently to the date and execution of the testator's will, and by several indentures, dated in 1863, 1864, and 1865, in consideration of the several prices and sums of £62, £40, £375, £2258, £490, £200, and £95 respectively, paid by testator to the several vendors, other lands and hereditaments in such several indentures described, and situate in the parish of *Yatton*, and near or adjoining to the before-mentioned hereditaments, were conveyed to the testator in fee.

The Plaintiffs were the trustees and executors of the will, and the Defendants were the different persons interested under the will; and the bill prayed that it might be ascertained and declared which of the hereditaments were included in the specific devise in the testator's will of his mansion and estate called *Cleeve Court*, and whether any, and which, of such hereditaments were included in the devise of his residuary estate.

The case came on upon adjourned summons, taken out by the eldest son of the testator, to vary the certificate of the Chief Clerk, who had found that the estate contracted to be purchased by the testator before the date of his will, but conveyed to him afterwards, passed under the devise of the *Cleeve Court* estate; and that the lands purchased at different periods subsequently to the date of the will passed under the residuary devise.

V.-C. M. 1871 CASTLE v. FOX.

There was evidence to shew that the testator was very desirous of acquiring the additional lands purchased subsequently to the date of his will, and after making such purchases he had observed to one of the witnesses that the *Cleeve Court* then lay within a ring-fence.

Mr. *Pearson*, Q.C., and Mr. *Wickens*, for the Defendant, the eldest son of the testator:—

The 24th section of the *Wills Act* (1 Vict. c. 26) provides that the will shall be construed with reference to the real and personal estate comprised in it, as if it had been executed immediately before the death of the testator, unless a contrary intention should appear. The whole of this property, including all the purchases made by the testator after the date of his will, must therefore pass under the designation of the *Cleeve Court* estate. The lands so purchased were treated by him as additions to his *Cleeve Court* estate, and were occupied by him together with, and as forming part of, that estate from the time he purchased them until his death. The property contracted to be purchased before the date of the will, and subsequently conveyed to the testator, had originally formed part of the *Cleeve Court* estate, and from the position of the rest of the purchased lands, some of them adjoining the original *Cleeve Court* estate, and some pieces actually intersecting the property, it is evident that the testator intended to treat the whole as forming part of his *Cleeve Court* estate; and that this was the case is made more plain by the effect of the evidence, which shews that the testator had taken his opportunity from time to time to make these purchases, for the purposes of forming one connected estate, or, as he expressed himself, to bring it within a ring-fence. That this evidence of the testator's intention is admissible, is decided by the case of *Webb* v. *Byng* (1), where a testatrix devised all her *Quendon Hall* estates in *Essex*, and it was held that extrinsic evidence was admissible to shew what estates she understood to be comprised in that description.

The authorities in favour of our view of what passed by the will are distinct, and the principle is laid down clearly. In *Lady Langdale* v. *Briggs* (2), where a testator, after the date of his will, became

(1) 1 K. & J. 580. (2) 8 D. M. & G. 391.

entitled to the personal estate of a deceased sister, as one of her next of kin, it was held that leaseholds forming part of the sister's general estate passed under a specific bequest of leasehold property. In *Miles* v. *Miles* (1), a devise of a particular house, partly freehold and partly leasehold, was held to pass the reversion in fee, which was purchased subsequently to the date of the will; and in *Mathews* v. *Mathews* (2), under a devise of all the testator's freehold messuages, situate at a place named, the testator being possessed of a term of years, and also seised of the reversion of a part of the property in fee, from the expiration of three years after the end of the term, it was held that the whole interest passed. *Cox* v. *Bennett* (3) was a similar case, in which a reversion in fee, purchased after the date of the will, was held to pass under a bequest of a leasehold house. *Goodlad* v. *Burnett* (4) is a strong case, where a gift of "my New 3¼ per Cent. Annuities," was held to include all the New 3¼ per Cents. which the testatrix had purchased after the date of her will. *Doe* v. *Walker* (5), *In re Midland Railway Company* (6), and *Strevens* v. *Bayley* (7), are also authorities carrying out the same principle.

Mr. *Cole*, Q.C., and Mr. *Bird*, for the principal Defendants:—

There can be no doubt, as a general rule, under the *Wills Act*, that all property acquired after the date of the will passes, but that only applies to a general description, such as a gift of "all my estate," where the words would have a general reference, or to a bequest of "all my 3¼ per Cents." The cases referred to are all of that class, but the principle does not apply to words of designation such as are found in this will: "All my mansion and estate called *Cleeve Court*," are words specifying a particular estate known as the *Cleeve Court* estate at the date of the will, and any subsequently purchased lands, although they might adjoin the *Cleeve Court* estate, did not form part of the thing designated in the will. The case of *Webb* v. *Bing* (8) is in our favour, and very much resembles this; for there estates acquired after the date of the

(1) Law Rep. 1 Eq. 462.
(2) Ibid. 4 Eq. 278.
(3) Ibid. 6 Eq. 422.
(4) 1 K. & J. 341.
(5) 12 M. & W. 591.
(6) 34 Beav. 525.
(7) 8 Ir. Com. L. Rep. 410.
(8) 1 K. & J. 580.

V.-C. M. 1871 CASTLE v. FOX.

will, although the testatrix had contracted to purchase some of them before the date of the will, and although they were very small additions to what was comprised in the devise, were held not to pass under the words "all my *Quendon Hall* estates." *Doe* v. *Walker* (1) turned upon the question whether the *Wills Act* applied to a will, republished by codicil, after the Act came into operation; and the same observation is applicable to the case of *Hughes* v. *Hosking* (2). Then we have cases directly contrary to those which have been cited. In *Cole* v. *Scott* (3), the words "all the estates of which I am now seised or possessed," were held to indicate the property which the testator had at the date of his will, and to shew such a "contrary intention" as to take the case out of the 24th section of the *Wills Act*. *Hutchinson* v. *Barron* (4) is a case fully carrying out our contention. The words were: "I give and devise all that my messuage or dwelling-house, and the buildings and land belonging thereto, now occupied by me." Baron *Martin* there held that the word "now" meant at the date of the will, and that two acres of land previously let to a tenant, and taken into the possession of the testator after the date of his will, did not pass. The learned Judge referred to *Jarman* on Wills (5), where *Cole* v. *Scott* is cited, and said he thought that case was well decided, and was an example of the construction of "now" to be a date only.

Emuss v. *Smith* (6) is another case in which the will is made to speak from the date, and the distinction is laid down in *Douglas* v. *Douglas* (7), that "all my stock" would pass after-acquired stock, but not "all my stock which I have purchased," which only passed the stock which the testator had at the date of the will.

The question, therefore, comes to this: what land was comprised in the *Cleeve Court* estate? The words used by the testator are equivalent to saying, "I give my *Cleeve Court* estate, of which I am now seised," which must necessarily mean at the date of the will. It is a particular designation of a particular thing

(1) 12 M. & W. 591.
(2) 11 Moo. P. C. 1.
(3) 1 Mac. & G. 518.
(4) 9 W. R. 538.
(5) Page 261.
(6) 2 De G. & Sm. 722.
(7) Kay, 400.

known by a certain name at a fixed period, namely, the date of the will, and nothing that the testator acquired afterwards can pass under such a devise.

The testator has, moreover, shewn distinctly what his intention was by the words of the residuary clause, where he gives the residue of his property of every description other than those thereinbefore mentioned; thereby clearly denoting that nothing he had not before mentioned was to pass under the specific devise, and thus shewing the contrary intention required by the *Wills Act*.

Mr. *Rawlinson*, for one of the sons.

SIR R. MALINS, V.C.:—

This case raises a point of considerable nicety and importance upon the construction of the *Wills Act*, but one upon which I confess, after the elaborate argument I have heard, I am not able to bring myself to entertain the least doubt. The testator, *Robert Castle*, as appears by the Chief Clerk's certificate, purchased in the year 1859 an estate called *Cleeve Court*, consisting of a mansion-house and 281 acres of land. That estate was conveyed to him in 1859. He afterwards, before the date of his will, for the purpose of increasing that estate, purchased another property called *Kingswood*, which was bought in August, 1859, and conveyed to him in the month of December, 1861. The will is dated the 14th of March, 1861, so that the bulk of the estate was conveyed to him about two years before the date of the will; but *Kingswood* was not conveyed to him till after the date of the will.

The testator died in July, 1866, and between 1861 and the time of his death he made various acquisitions of land, one purchase for the small sum of £62, a limekiln, which is almost in the centre of the estate, so that any man possessed of the estate would naturally be most desirous of acquiring that property. He purchased another property for £40 for similar reasons, and another for £375, and then he bought one partly at the boundary of the estate and partly in the centre for £2258. He afterwards bought three acres for £490, some other property for about £200, and he finally purchased a small plot for about £95. Those purchases

V.-C. M. 1871 CASTLE v. FOX.

cost in the whole somewhere above £3500. The evidence before me which is receivable upon the motion to vary the certificate, is, that he was from the time he purchased the estate very desirous of acquiring these additional lands, and that after he purchased them he said to one of the witnesses: "It lies in a ring-fence;" that is, there were no other lands interposed, but he had it all to himself. [The Vice-Chancellor then stated the terms of the will, and continued:—] The point I have to consider is, whether this devise of the mansion and estate called *Cleeve Court*, with the appurtenances, must necessarily be limited to that part of the *Cleeve Court* estate of which the testator was the owner at the date of his will—that is, the original estate, with the addition of *Kingswood*, which was contracted to be purchased before, but which was conveyed to him after the date of his will.

It has been much pressed upon me that, although, as a general rule, it cannot be denied that under the 24th section of the *Wills Act* all property acquired by a testator after the date of his will will pass where there is a general description, that rule will not apply when there is a particular description. As far as I am concerned, I wish to give to the words of the enactment a broad and liberal interpretation—one which will carry into effect at the same time the intention of the testator and the intention of the Legislature, so as not to fritter and cut down the language and make it apply to as few cases as possible, but to apply it to all cases where I am satisfied the intention of the Legislature will be effectuated. We know the evil that previously existed under the old law applicable to wills, and it was disgraceful that it should have been allowed to remain for generations as it was. The evil has, in my opinion, been entirely corrected by this statute. The section enacts that every will shall be construed with reference to the real and personal estate comprised in it, as if it had been executed immediately before the death of the testator, unless a contrary intention should appear. According to my view of this case, I am to read the will with reference to the state of things as they stood immediately before his death. I find he gave the *Cleeve Court* estate with the appurtenances. To what time am I to apply the question, What is the *Cleeve Court* estate, and what are its appurtenances? The Legislature says I am to read the will as

if it had been made immediately before the death of the testator. Therefore, I am to ask the question what it is he called the *Cleeve Court* estate at the time of his death? In my opinion, it is proved beyond all possibility of doubt that what he considered the *Cleeve Court* estate was not only that which he had bought under that designation in 1859, with the addition he had made to it in the same year of the *Kingswood* estate, but all those additions that had been made to it from 1861 down to the time of his death in 1866. Therefore, finding he treated the whole of the property as *Cleeve Court*, the Legislature imposes upon me the obligation of reading this will as made immediately before the testator's death. And it appears to me as plain as anything can be that I am only at liberty to ask what was known as the *Cleeve Court* estate immediately before the death of the testator. If, upon the evidence, I come to the conclusion that these additions had been made to these lands, and had become by the act of the testator part of the estate, and were regarded and treated by him as part of the estate, it is my duty to say that all that he considered as part of the *Cleeve Court* estate passed by his will.

Looking at the transaction itself, can any man doubt what the intention of the testator was? Can there be the slightest doubt that in making these purchases—all for very small sums, except the £2258—his object was to buy up the small patches of property which lay inconveniently intermixed with the estate and add them to it? This point was much pressed upon me, that I am not at liberty to go into evidence upon that question, that I am not at liberty to look at the surrounding circumstances when there is a particular devise, although I may do so when there is a general devise. It is admitted that if he had said, "All my lands in the county of *Somerset*," everything would have passed; but because he says, I give a particular part of it, which is known by a particular name, and he has added property which is also known by that name, therefore it is not to pass, because I must read the description of *Cleeve Court* as applying only to that which was, in the strict sense of the word, *Cleeve Court* at the date of his will. In pressing the argument to that extent, it must follow that the decision of the Master of the Rolls in *In re Midland Railway Company* (1) must be entirely wrong. In

(1) 34 Beav. 525.

V.-C. M. 1871 CASTLE v. FOX.

that case, the testator devised "a messuage or dwelling-house, wherein *D. C.* now resides, with the stables or appurtenances thereto belonging and therewith occupied." If this argument is good for anything, nothing could pass by that description but that which was actually part of it when the will was made; but between the date of the will and the death of the testator he purchased a garden, which he attached to the existing messuage; and if the argument is to prevail, the Master of the Rolls ought to have held that the original property only passed by the will, and that the garden which had been added to it did not pass. Suppose a man has a house and garden, and he finds his garden too small, and purchases from his neighbour some more land, which he adds to his own garden, and builds a new wall. In that case, I ought to hold that as to one part of the garden, if there is a residuary devise, it would pass under that; but if there is no residuary devise, then I must hold that, although he died seised of a house and garden, which garden he had enlarged after the date of his will, therefore he died intestate as to one part of the garden. Such arguments lead to conclusions utterly repugnant to sense, and, as I think, repugnant to the intention of the Legislature in making this enactment. Therefore, it appears to me that, whether it be a particular description, or whether it be a general description, if a testator, as in the present case, gives property by a particular name, the question is, not what was known by that name when he made his will, but what was known by that name and treated by him as coming under that description at any time during his life; and I think, therefore, evidence as to his treatment of the property, and what he called the particular estate after the date of his will, is just as legitimate evidence as evidence of what he did before the date of his will, because the words of the statute are, that I am to read the will as speaking immediately before the death of the testator, unless a contrary intention appears. No such contrary intention does appear here, and therefore I think the whole of this evidence, shewing what the testator treated as part of the *Cleeve Court* estate not only before, but between the date of his will and his death, is as legitimate as any evidence that can be given for the purpose of putting the Court in the position of the testator. It happens here that between the date of the will and the death of the testator there is an interval

of only five years, but I have had many cases where, between the making of the will and the death of the testator, there has been twenty or thirty years' interval. A man may add a great deal to an estate during that time, but although he may have done so, and may have described it in a deed after the date of his will as an estate, according to the argument I am not at liberty to receive that evidence, because I can only receive evidence as to what was part of the estate at the date of the will.

The argument is further carried to this extent: It is said that this is distinctly shewn by the residuary devise—"I give and bequeath all the rest, residue, and remainder of my property of every description other than those hereinbefore mentioned and expressed." It was argued that "hereinbefore mentioned and expressed" is only that which he had at the date of the will; that that only is mentioned; *ergo*, nothing can pass but that which is there mentioned. The effect of that, again, is to abrogate the statute, and to pass over the words of the Legislature altogether.

Many cases have been put by way of illustration, and I think the case in Mr. *Jarman's* book (1) about the house in *Grosvenor Square* is a very good one. Suppose a testator has a house in *Grosvenor Square*, and he says in his will, "I give my house in *Grosvenor Square;*" then suppose he sells the house he had at the date of his will, and buys another in *Grosvenor Square;* my opinion is (and I have not a doubt about it), that under that general description, "my house in *Grosvenor Square*," the house would pass. The Legislature says I must read the will as if it were made immediately before the death of the testator. Doing that, I find he has a house in *Grosvenor Square*, and that must necessarily pass. But if he adds a description shewing that he meant a particular thing only—if, for instance, he says, "I give my house No. 2, *Grosvenor Square*," and if he afterwards sells that house, and buys No. 6, I am equally clear that No. 6 would not pass, because a contrary intention is expressed. He has sold the house No. 2, and has no longer got it, and the devise is adeemed by the sale of that house, and you cannot apply the general description of "my house" where he has specifically described the house by name. Therefore I am as clearly of opinion that in that case

(1) 3rd Ed. vol. i. p. 309.

V.-C. M. 1871 CASTLE v. FOX.

it would not pass, as I am of opinion it would pass in the former case. So I answer the question put by Vice-Chancellor *Knight Bruce* with regard to the brown horse (1): "Suppose a man to have a brown horse," the Vice-Chancellor says, "and bequeath it, and then to sell it, and buy another brown horse, and die, does the horse of which he was possessed at the time of his death pass?" I should say, unless he uses other words to describe the brown horse, all I am at liberty to ask is, had he a brown horse when he died? Yes. Then he has said, "I give my brown horse," and that is the one he applied the description to, and it is perfectly immaterial that he had another brown horse when he made his will. Those are the general rules that are applicable to this subject, and I say so because at the same time that they carry into effect the intention and language of the Legislature, I am satisfied they also carry into effect the intention of the testator.

Now, is there anything to be found in the cases which have been cited contrary to this view? The general rule laid down by Lord Justice *Turner* in *Lady Langdale* v. *Briggs* (2) is in strict accordance with it. With regard to the case of *Lord Lilford* v. *Powys Keck* (3), a distinction was attempted to be drawn there, because the testator said: "I give all my freehold estate, of or to which I am seised or entitled, and I give the copyhold estate, which I am, or at the time of my death shall be possessed of or entitled to." It was argued, that inasmuch as he had, with reference to the copyholds, pointed to the acquisition of other property, and had not done so as to the freeholds, therefore after-acquired freeholds would not pass, as he had shewn an intention that after-acquired copyholds should pass. But I am happy to find that the Master of the Rolls did not give any sanction to that argument, but gave effect to the broad intention of the Legislature, and held, that inasmuch as the testator said he gave all his freehold estate, that the will spoke for that purpose from the death of the testator, and passed everything he had at the date of the will, as well as all he acquired afterwards. Two other cases were cited to me—*Miles* v. *Miles* (4) and *Cox* v. *Bennett* (5)—one before Lord *Romilly*, and

(1) 2 De G. & Sm. 733.
(2) 8 D. M. & G. 391.
(3) 30 Beav. 300.
(4) Law Rep. 1 Eq. 462.
(5) Law Rep. 6 Eq. 422.

the other before Vice-Chancellor *Giffard*. In each case the testator gave a particular house of which he was a leaseholder at the date of his will, but of which he acquired the freehold afterwards. In both those cases it was decided that, having devised a particular thing, it passed every interest the testator subsequently acquired in it. In *Goodlad* v. *Burnett* (1) a very extended construction was given to a will by the present Lord Chancellor when Vice-Chancellor. In that case the testator said: "I give all my 3¼ per Cents.;" and it was there said he only intended to pass the 3¼ per Cents. he had when he made his will; but he more than trebled them afterwards. The words were general, and the Vice-Chancellor there applied the rule I do here, and made the will speak as from the death of the testator, and said: "All you can ask is, what 3¼ per Cents. he had at the time of his death. The will speaks from the time of his death, and all he had then passed."

In the case of *Doe* v. *Walker* (2) the testator, having acquired property after the date of the will, said: "I devise the lands I have;" and the question was, whether those words were to speak at the time of the making of the will, or at the time of the death of the testator; and it was decided by the Court of Exchequer on the broad principles of common sense, and in accordance with what was the intention of the Legislature, that the will was to speak from the death of the testator, and that the words, "the lands which I have," meant "the lands I have at the time of my death," and therefore after-acquired lands passed. Then there is a case which has been a good deal commented upon, the case of *Cole* v. *Scott* (3), and which came first before Sir *Lancelot Shadwell*, and afterwards before Lord *Cottenham*. I argued it before both those learned Judges. I was at the time entirely dissatisfied with the result of the decision, and I am equally dissatisfied now. It is not necessary for me to go into it, because the decision entirely depended on a word which is not to be found in this will, the word "now." In *Doe* v. *Walker* it had been decided that the words, "the lands which I have," passed after-acquired lands. Lord *Cottenham* came to a contrary conclusion, namely, that "the lands which I now have" meant "lands which I have at the date of the

(1) 1 K. & J. 341. (2) 12 M. & W. 591.
(3) 1 Mac. & G. 518.

V.-C. M. 1871 CASTLE v. FOX.

will," and did not pass after-acquired lands. I confess I am totally at a loss to see the distinction between the expression "lands which I have" and "lands which I now have." It is merely a differing form of expression applying to the present tense. "The lands which I have" means "lands which I now have;" and in both cases I am of opinion, on principle, that Lord *Cottenham* ought to have applied the rule that the will is to speak immediately before the death of the testator. As the testator dies he is supposed to say, "I give all the lands I now have;" and therefore I think it ought to have passed subsequently-acquired lands. The word "now" does not occur here, and therefore it is not necessary for me to decide in opposition to that case; but I have no hesitation in saying that if the word "now" had occurred here, I should have come to the same conclusion that I now do, and decided in opposition to *Cole* v. *Scott* (1), in order that the case might be carried further if the parties desired, and that that decision might be reconsidered. In the meanwhile, I can only express my dissent from it.

The case of *Webb* v. *Bing* (2), decided by the present Lord Chancellor when Vice-Chancellor, turned upon very peculiar circumstances. The words in the will were: "I give my executors all my *Quendon Hall* estates in *Essex*." Upon the principle I have adverted to, I take it to be quite clear that every addition the testatrix had made between the date of her will and her death to the *Quendon Hall* estates ought to have passed. But the description was a very inaccurate one, and the evidence, in my opinion, totally failed to shew that the lands she afterwards acquired were an addition to that estate, and I think it was upon the failure of the evidence to prove that it was a part of the estate that the decision of the Vice-Chancellor entirely proceeded, because in so many other cases he decided that after-acquired property does pass by a general description in a will. But if the intention was to decide in that case that any additions made by the testatrix to the *Quendon Hall* estate, between the date of her will and her death, did not pass, I should most respectfully dissent from that conclusion. I cannot help thinking, in a case like this, where it is clear beyond all doubt that these lands were an

(1) 1 Mac. & G. 518. (2) 1 K. & J. 580.

addition to this estate, the Lord Chancellor would come to the same conclusion as I do, that all additions of that kind to that particular estate would as much pass by the description as if they had been in the possession of the testator at the date of his will.

There is one other case I must refer to, of *Hughes* v. *Hosking* (1), which apparently, at first sight, is opposed to *Doe* v. *Walker* (2). But I think it is perfectly clear, upon looking at the case, that it proceeded on the ground that there was a particular description of the thing devised in the original will, words like the words, "I devise my house No. 2, *Grosvenor Square*," or "the brown mare I bought of *A. B.*," something added to, or limiting it to, a particular property; and that it was on that ground the case was decided, and not in the slightest degree in opposition to the decision of *Doe* v. *Walker*.

Upon all these grounds, therefore, I am of opinion that the properties subsequently purchased by the testator were additions to the *Cleeve Court* estate, and that the summons taken out by the eldest son of the testator must be allowed; and there must be a declaration, if necessary, that all those subsequently-purchased lands passed by the devise of the *Cleeve Court* estate and its appurtenances.

Solicitors for the Plaintiff: Messrs. *Torr, Janeway, & Co.*

Solicitors for some of the Defendants: Messrs. *Clarke, Woodcock, & Ryland.*

Solicitors for the other Defendants: Messrs. *Bannister & Fache.*

(1) 11 Moo. P. C. 1. (2) 12 M. & W. 591.

V.-C. M.
1870
Dec. 22.
1871
Jan. 11.

TRACY *v.* OPEN STOCK EXCHANGE.

Practice—Bill of Certiorari—Mayor's Court—Removal of Suit.

Where a suit in the Lord Mayor's Court was removed by writ of *certiorari* into the Court of Chancery, and where it appeared upon the face of the bill in the Mayor's Court that some of the Plaintiffs were out of the jurisdiction of that Court, an order was made *ex parte*, without further evidence that the suit in the Mayor's Court be retained in this Court.

An order was also made in the suit from the Mayor's Court that the Registrar of that Court might be at liberty to pay over to the credit of the cause in this Court the money paid into the Mayor's Court.

ON the 22nd of August, 1870, the Defendants to this suit filed a bill in the Lord Mayor's Court, entitled *Billing* v. *Tracy*, against the Plaintiffs, praying that the Plaintiffs might be restrained from parting with certain securities, and that they might be ordered to deliver such securities to the Plaintiffs in that suit upon payment of certain sums therein mentioned. Several orders had been made in that suit.

This bill of *certiorari* was filed by *Dowdeswell Tracy*, *Augustus Tracy*, and *Thomas McAnally*, Defendants to the suit in the Lord Mayor's Court, against the *Open Stock Exchange* and three other Defendants, praying that a writ of *certiorari* be directed to the Lord Mayor and Aldermen of the City of *London*, commanding them to certify and remove the cause of *Billing* v. *Tracy*, which had been so filed against the Plaintiffs in the Lord Mayor's Court, with the process and all proceedings thereon, into this Court.

On the 12th of December last, upon a motion made before the Lord Chancellor by Mr. *Higgins* on behalf of the Plaintiffs, an order was made in the terms of the prayer of the bill, and in accordance with the 20th section of the *Mayor's Court of London Procedure Act (Local)* (20 & 21 Vict. c. clvii.).

Dec. 22. Mr. *Higgins* moved that the writ of *certiorari*, the

return to the writ by the Mayor's Court, and the proceedings in that Court, might be filed on the record of the Court of Chancery, and also that the suit of *Billing* v. *Tracy* might be retained in the Court of Chancery, on the ground that it appeared by the bill in the Mayor's Court that three of the four Plaintiffs in that suit were resident out of the jurisdiction of that Court. A similar order had been made by Vice-Chancellor *James* on the 20th of July, 1869, in the case of *Jones* v. *Hey*, where it appeared on the face of the bill in the Lord Mayor's Court that some of the parties were out of the jurisdiction; and thus the old practice, that the Plaintiffs, upon obtaining the writ of *certiorari*, should give an undertaking that they would justify the issuing of the writ, was rendered unnecessary.

SIR R. MALINS, V.C., upon the authority of the case of *Jones* v. *Hey*, made an order *ex parte* in the following terms:— That the said writ and the proceedings returned therewith from the Mayor's Court of the City of *London* in a suit of *Billing* v. *Tracy*, instituted in that Court by the Defendants against the Plaintiffs, be filed on the record of this Court. And it appearing by the bill filed in the said Mayor's Court that the Plaintiffs, *F. Billing*, *G. W. Hayne*, and *C. F. Hayne*, are resident out of the jurisdiction of that Court, this Court doth order that the said suit of *Billing* v. *Tracy* be retained in this Court.

1871

Jan. 11. Mr. *Higgins* now moved in the suit of *Billing* v. *Tracy*, on behalf of the Defendants to that suit (the Plaintiffs in *Tracy* v. *Open Stock Exchange*), that *Woodthorpe Brandon*, Esq., the Registrar of the Mayor's Court, might be at liberty, on or before the 31st of January, 1871, to pay into the bank, to the credit of this cause, the sum of £7050, being the amount paid by the Plaintiffs in *Billing* v. *Tracy* into the said Mayor's Court on the 27th of August, 1870, pursuant to an order of that Court; and that the said sum of £7050, when so paid in, and interest thereon, might be laid out in the purchase of Reduced

V.-C. M. 1871 TRACY v. OPEN STOCK EXCHANGE.

Annuities, in the name of the Accountant-General, in trust in this cause.

Mr. *Stallard*, for the Plaintiffs in *Billing* v. *Tracy*, consented to the terms of the motion.

The VICE-CHANCELLOR made the order.

Solicitor for the Plaintiffs: Mr. *J. Tucker.*

Solicitors for the Defendants: Messrs. *Tathams, Curling, Walls, & Pym.*

In re EDDELS' TRUSTS.

V.-C. B.
1871
Feb. 18, 25.

Will—Devise of Realty—Equitable Remainder—Failure of Life Estate—Intermediate Rents—Residue.

Testator devised a freehold house to trustees and their heirs, upon trust "to permit and suffer or sufficiently authorize and empower" his wife "to receive and take" the rents for her separate use; and after her decease upon similar trusts in favour of his niece *E. W.*; and from and after her decease to stand seised of the same house upon trust for all or such one or more of her children or child as she should by deed or will appoint, and in default (which happened) of appointment, upon trust for all and every the child and children of *E. W.*, "who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or be sooner married; if more than one, in equal shares as tenants in common" . . . but if no child of *E. W.* should "live to attain a vested interest in" the premises, the house was to fall into his residuary real estate. The will gave to the trustees for the time being power, with the consent of the wife during her life, to lease the house.

After the testator's death, his wife entered into receipt of the rents of the house; and after her death *E. W.* entered into receipt of the rents, and so continued until her death in 1861. Her only child, a daughter, attained twenty-one in 1870:—

Held, that the remainder to the daughter of *E. W.* was an equitable remainder, and consequently did not fail, although the preceding life estate failed before she attained twenty-one:

Held, further, that the intermediate rents of the house fell into the residuary real estate.

Riley v. *Garnett* (1) not followed.

NATHANIEL KEEN EDDELS, by his will, dated the 5th of June, 1848, after directing payment of his debts, funeral and testamentary expenses, and making several specific and pecuniary bequests, gave, devised, and bequeathed unto *Benjamin Poulson* and *Samuel Hemming* (since deceased), a freehold house, No. 153, *Whitechapel Road, Middlesex*, another freehold house in the borough of *Stroudwater*, in the county of *Gloucester*, all his money or stock in the New £3¼ per Cent. Bank Annuities, and in the annuities for terms of years, and all the rest, residue, and remainder of his real and personal estate whatsoever and wheresoever, to hold "unto them" and the survivor of them, "his heirs and assigns, according

(1) 3 De G. & Sm. 629.

V.-C. B. 1871 *In re* Eddel's Trusts.

to the nature and quality thereof, and my estate and interest therein," upon trust, as soon as conveniently might be after his decease, to get in and convert such part of the personal estate as should not consist of money, or money in the public stocks or funds, and invest the same, or such part thereof as it should not be necessary to apply in payment of debts, funeral and testamentary expenses and legacies, in some or one of the public stocks or funds; "and upon further trust to permit and suffer or sufficiently authorize and empower my said wife to receive and take" the rents and annual proceeds of the real and personal estate "for her own sole and separate use," and for which her receipt should be a good discharge; and he directed and declared that from and after the decease of his wife, the trustees or trustee for the time being of that his will should stand seised of his house in the *Whitechapel Road*, upon trust "to permit and suffer and sufficiently to authorize and empower" his niece *Eliza Wakefield* "to receive and take" the rents, issues, and profits thereof for her life, free from the debts, control, or engagements of any husband, her receipts to be good discharges; and he directed and declared that, from and after the decease of the said *Eliza Wakefield*, the trustees or trustee for the time being of that his will should stand seised of the same house upon trust for all or such one or more, exclusively of the children or child of the said *Eliza Wakefield*, as she, notwithstanding coverture, should by deed or will appoint; and in default of such appointment, and so far as any such appointment should not extend, as follows:—

"Upon trust for all and every the child and children of the said *Eliza Wakefield* who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or be sooner married; if more than one, in equal shares as tenants in common, and not as joint tenants, for the absolute benefit of such child or children respectively; but if there shall be no such child of the said *Eliza Wakefield* who shall live to attain a vested interest in the said last-mentioned trust premises under the trusts hereinbefore lastly contained, I do hereby direct that the said last-mentioned freehold messuage or tenement, with the appurtenances thereunto belonging, shall fall into and form part of my residuary real and personal estate."

And "as to all the rest, residue, and remainder of my real and personal estate whatsoever and wheresoever that I shall be seised or possessed of, interested in, or entitled to at the time of my decease, not hereinbefore specifically disposed of," testator gave the same to his brother *James Creed Eddels* and *Samuel Hemming* aforesaid, their heirs, executors, administrators, and assigns, absolutely, in equal shares as tenants in common. The will contained the following clause:—

"Provided always, and I hereby further declare, that it shall and may be lawful to and for my trustees, with the consent and concurrence of my said wife, during her life, by indenture or indentures, to demise or lease my said freehold messuage or tenement, No. 153, *Whitechapel Road* aforesaid, to any person or persons for any term or number of years not exceeding twenty-one, in possession and not in reversion, at the best and most improved yearly rent or rents that can reasonably be had or gotten for the same, without taking any fine or premium for the making thereof, so that there be contained in every such lease a clause in the nature of a condition for re-entry for non-payment of rent thereby to be reserved, and so that the lessee or lessees thereof be not dispunishable for waste, and so that every such lessee or lessees do execute a counterpart of every such lease."

The testator appointed his wife, *Sarah Eddels*, *Benjamin Poulson*, and *Samuel Hemming* his executors. He died on the 8th of June, 1849, and the will was proved by *Poulson* and *Hemming* alone, *Sarah Eddels* having renounced.

Upon the testator's death, *Sarah Eddels* went into and remained in receipt of the rents and profits of the freehold house until her death, on the 4th of August, 1858.

Thereupon *Eliza Wakefield*, who had married *Thomas Freudemacher*, went into and remained in receipt of the same rents and profits until her death, which took place on the 10th of January, 1861, without her having made a will, or exercised the power of appointment in any way. She had issue of her marriage with *Thomas Freudemacher* one child only, *Eliza Sarah*, now living, who was born on the 16th of May, 1849, and was hitherto unmarried.

Since the death of *Eliza Freudemacher*, *Benjamin Poulson*, the

V.-C. B. 1871 *In re* EDDEL'S TRUSTS.

surviving executor of the will, had received the rents, and invested them and the dividends arising from the investments from time to time in £3 per Cent. stock.

Miss *Freudemacher*, having, on the 16th of May, 1870, attained twenty-one, applied to *Poulson* to pay her the above accumulations, whereupon *Poulson* paid a sum of £656 1*s.* 6*d.* cash, representing the balance of such amount, into Court, to an account intituled "An account of money received in respect of the rents of the testator's freehold house, 153, *Whitechapel Road*."

This Petition was then presented by *Elizabeth Hemming*, representing *Samuel Hemming*, one of the residuary devisees of the testator's will, and by *Clara Elizabeth Johnson*, *Emma Wilmot Eddels*, *Thirza Eddels*, and *Arthur Eddels*, representing *James Creed Eddels*, the other residuary devisee, in the matter of the trusts of the will, the account above-mentioned, and of the *Trustee Relief Act*, stating that doubts had arisen as to whether the accumulations belonged to Miss *Freudemacher*, or fell into the residue; and prayed that, after taxation and payment of costs, one-half of the residue of the fund might be paid to the first Petitioner, and that the other half might be divided into fourths, and paid to or for the benefit of the last four Petitioners.

The Respondents to the Petition were *Eliza Sarah Freudemacher*, *Benjamin Poulson*, *Charles*, the husband of Mrs. *Johnson*, and *Emma Marina Eddels*, the mother and next friend of the last-named Petitioner, who was an infant.

Mr. *Karslake*, Q.C., and Mr. *W. Haughton*, for the Petitioners:—

Either the legal estate is not in the trustees, in which case the limitation in default of appointment to the children and child of *Eliza Wakefield* was a legal contingent remainder, which, in the event which has happened, has failed by reason of the failure of the particular estate of freehold; or the legal estate is in the trustees (as we contend it is), in which case the remainder, being equitable, does not fail; but, nevertheless, we submit that the intermediate rents, until Miss *Freudemacher* attained twenty-one, fall into the residue, as being undisposed of.

In support of the latter proposition the authorities are: *Festing*

v. *Allen* (1); *Browne* v. *Browne* (2); *Holmes* v. *Prescott* (3); *Hodgson* v. *Lord Bective* (4); *Countess of Bective* v. *Hodgson* (5); *Perceval* v. *Perceval* (6); *Wills* v. *Wills* (7); *Leake* v. *Robinson* (8); *Bull* v. *Pritchard* (9); *Newman* v. *Newman* (10); *Fearne's* Contingent Remainders (11), referring to *Elie* v. *Osborne* (12).

Mr. *Kay*, Q.C., and Mr. *Jolliffe*, for the Respondent, *Eliza S. Freudemacher*:—

It must be conceded that, if this limitation was a legal contingent remainder, it has failed, and that we cannot claim these rents.

But it is clear that the legal estate is in the trustees. The life estates are for the separate use of the married women for their lives; therefore the trustees have the legal estate. Then there is the power (not to appoint by way of demise, but) to lease. These circumstances are sufficient.

That being so, the remainder does not fail; and as to the intermediate rents, the case is precisely within *Riley* v. *Garnett* (13).

In *Festing* v. *Allen* there was no question of intermediate rents; the question only was whether the remainder was vested or contingent. In *Browne* v. *Browne* the sole question was, whether or not *Festing* v. *Allen* was rightly decided. In *Holmes* v. *Prescott* there was the peculiarity that the rents of the leaseholds were limited as the rents of the freeholds were to go; and as the Court could not give the intermediate rents of the freeholds, because the legal contingent remainder had failed, they felt bound to come to the same decision as to the rents of the leaseholds. *Wills* v. *Wills* was a gift to trustees, upon trust to convey to the person who, at the death of the tenant for life, should be the second son of somebody; and as no one could possibly say till the moment arrived that he would be such second son, the gift of the intermediate rents was necessarily held to be contingent. *Countess of Bective* v. *Hodgson*, as appears from Lord Chancellor *Westbury's* judgment (14), was decided

(1) 12 M. & W. 279.
(2) 3 Sm. & Giff. 568.
(3) 12 W. R. 636.
(4) 1 H. & M. 376.
(5) 10 H. L. C. 656.
(6) Law Rep. 9 Eq. 386.
(7) 1 D. & War. 439.
(8) 2 Mer. 363.
(9) 5 Hare, 567.
(10) 10 Sim. 51.
(11) 10th Ed. p. 282.
(12) 2 Vern. 754; 1 P. Wms. 387.
(13) 3 De G. & Sm. 629.
(14) 10 H. L. C. 665.

V.-C. B. 1871 *In re* EDDEL'S TRUSTS.

on the old feudal principle, that the fee can never be in abeyance. Here the fee is in the trustees throughout.

The enactment contained in the 31st section of the *Wills Act* (1 Vict. c. 26) is sufficient to vest the legal estate in the trustees.

Mr. *Karslake*, in reply:—

Whether the limitations for life be legal or equitable is immaterial.

The VICE-CHANCELLOR said he should consider it part of his duty to decide that point.

Mr. *Karslake*:—That the legal estate was in the trustees during the lives of the tenants for life must be admitted. But can it be said that the "purposes" of this trust have "continued" beyond the lives of the tenants for life, within the meaning of the 31st section of the *Wills Act*? I submit that they have not, but that the estate was determined "when the purposes of the trust were satisfied," *i. e.*, at the death of Mrs. *Freudemacher*.

The power of leasing is a bare power without an estate.

The VICE-CHANCELLOR:—Do you limit the power of leasing to the life of the widow?

Mr. *Karslake*:—I am not driven to contend for that: *Doe* v. *Cafe* (1); *Lewin* on Trusts (2); *Jarman* on Wills (3).

But if it be otherwise, then I say *Riley* v. *Garnett* (4) is virtually overruled by *Holmes* v. *Prescott* (5), and *Countess of Bective* v. *Hodgson* (6).

SIR JAMES BACON, V.C.:—

The questions which are raised in this case are two. The first is, whether a remainder contingent on the attainment of twenty-one, fails by reason of the death of the tenant for life before the person entitled in remainder attained twenty-one; and the other relates to the rents and profits of a certain freehold house, which

(1) 7 Ex. 675.
(2) 5th Ed. p. 180.
(3) 3rd Ed. vol. ii. p. 281.
(4) 3 De G. & Sm. 629.
(5) 12 W. R. 636.
(6) 10 H. L. C. 656.

accrued during the period between the death of the last tenant for life and the attaining of the age of twenty-one by the person who, if the remainder was preserved, would be entitled to the house. The question arises on the will of *Nathaniel Keen Eddels*, who, by his will, devises a certain messuage in the *Whitechapel Road* to trustees, upon trust to authorize his wife, *Sarah Eddels*, to receive the rents during her life, and after her decease, to authorize his niece, *Eliza Wakefield*, to receive the rents during her life; and he directed and declared that from and after the decease of the said *Eliza Wakefield*:—[His Honour read the clauses set out above, and also the residuary devise and bequest.]

Now, the events which have happened are: the testator's wife survived him, and upon her death *Eliza Wakefield*, the niece, who had intermarried with *Thomas Freudemacher*, entered into possession of the rents and profits of the freehold house, and continued so until her death in January, 1861. Of *Eliza Wakefield's* marriage with *Thomas Freudemacher* there was only one child, *Eliza Sarah Freudemacher*, who was born in May, 1849, and is still living, and a spinster.

The Petition states that there was no exercise by Mrs. *Freudemacher* of the power of appointment of which she was possessed under the testator's will.

The trustees having received the rents during the interval between the death of the last tenant for life, Mrs. *Freudemacher*, and the attaining twenty-one of the present spinster, *Eliza Sarah Freudemacher*, a question (which the Petition states) arose as to whether the accumulations belong to *Eliza Sarah Freudemacher*, or whether they form part of the produce of the testator's residuary real estate.

The Petition states the title of the Petitioners, upon which I need not dwell: it seems to be sufficiently clear as to the persons who would be entitled to the residuary real and personal estate.

The Petition is presented by these persons (the trustees having paid the accumulated rents in their hands into Court under the *Trustee Relief Act*), and they state the questions in this way: "Your Petitioners submit that the interest of the said *Eliza Sarah Freudemacher* in the said freehold messuage under the will of the testator, *Nathaniel Keen Eddels*, was a contingent remainder, which

V.-C. B. 1871 *In re* EDDEL'S TRUSTS.

failed by reason of the said *Eliza Sarah Freudemacher* not having attained the age of twenty-one years at the death of her mother; or that, if the said *Eliza Sarah Freudemacher* is entitled to any estate therein, such estate did not vest until she attained the said age; and that the Petitioners, claiming under the will of the said *Nathaniel Keen Eddels*, are entitled to the fund in Court in the proportions which are there mentioned."

If the case was not governed, as I conceive it is, by decisions, there might be a good deal said, perhaps, in favour of the claim of *Eliza Sarah Freudemacher*. That it was the wish of the testator that she should possess the house and all that belonged to it, or arose out of it, nobody can well doubt for a moment.

If I were at liberty to follow the case of *Riley* v. *Garnett* (1), before Vice-Chancellor *Knight Bruce*, which was cited by Mr. *Kay*, the law would seem to be clearly in her favour. There are, however, those other cases which were mentioned, of *Countess of Bective* v. *Hodgson* (2) and *Holmes* v. *Prescott* (3), in which the very point was clearly decided; and decided after deliberate consideration and examination of all the cases, which were numerous, which had preceded them.

After the decision in *Holmes* v. *Prescott*, I do not feel myself at liberty to depart from the rule which I find there established; and, there being no gift of the intermediate rents, they must of necessity fall into the residue. That the contingent remainder was a perfectly good remainder I have not the slightest doubt. The contrary was scarcely argued. Mr. *Karslake*, indeed, rather refrained from arguing it.

If a literal construction of the will be resorted to, without reference to any decision, then perhaps it would be hard to say the testator has given anything but the house to *Eliza Sarah Freudemacher*, or has given that to her absolutely until the day on which she attained twenty-one. If that be so, then the intermediate rents must of necessity fall into the residue. I think, according to the decisions in the two cases I have mentioned, that is the clear rule of law there established.

I hold, therefore, that the prayer of the Petition, which asks

(1) 3 De G. & Sm. 629. (2) 1 H. & M. 376; 10 H. L. C. 656.
(3) 12 W. R. 636.

for a division of these accumulated rents between the persons entitled, as stated in the Petition, under the residuary bequest, must be acceded to; and the order must be in the terms of that prayer.

Mr. *Kay* asked the Court to make a declaration that the gift in remainder of the house did not fail.

Mr. *Karslake* submitted whether the point was before the Court.

The VICE-CHANCELLOR:—I think that the parties who have a right to raise the question have raised it by this Petition; and they have asked for a decision on this as one of the two points which they have submitted to the Court.

Therefore, I do not hesitate to declare that the house belonged to *Eliza Sarah Freudemacher* on her attaining twenty-one, but that the intermediate rents fall into the residue.

The costs of all parties, as between solicitor and client, will come out of the fund.

The following are minutes of the order:—

This Court, being of opinion that the trust by the said will of the said testator, *Nathaniel Keen Eddels*, in favour of the child and children of *Eliza Freudemacher*, in the said will called *Eliza Wakefield*, who, being a son or sons, &c. (reciting the limitation), was not defeated or destroyed by the death of the said *Eliza Freudemacher* before the Respondent *Eliza Sarah Freudemacher*, the only child of the said *Eliza Freudemacher*, attained the age of twenty-one years, such trust being supported by the estate of the trustee of the said will:

But being also of opinion that the rents and profits of the messuage and premises, No. 153, *Whitechapel Road*, which accrued during the minority of the said *Eliza Sarah Freudemacher*, did not pass to her on attaining the said age, but form part of the residuary real estate of the said testator:

Doth order, &c.

Solicitor for the Petitioners: Mr. *William Shearman.*

Solicitors for Miss *Freudemacher*: Messrs. *Hillearys & Tunstall.*

V.-C. B. 1871 March 4.

EARL ST. GERMANS *v.* CRYSTAL PALACE RAILWAY COMPANY.

Vendor and Purchaser—Railway Company—Line "worked and maintained" by another Company under Resolution of Directors—Unpaid Vendor's Rights—London, Chatham, and Dover Railway (Arbitration) Act, 1869 (32 & 33 *Vict. c. cxvi.*).

By the *London, Chatham, and Dover Railway* (*Arbitration*) *Act*, 1869, amongst the matters (sect. 17) referred to the arbitrators were, the legal and equitable rights and interests of companies whose lines were worked by the company, the rights of any persons having or claiming any lien upon any lands in which the company were interested, and all matters in question in all suits in which the company were parties; and it was enacted that the powers of the arbitrators should extend to ascertain and determine the matters aforesaid. It was also enacted (sect. 18) that the *Crystal Palace Railway* should be "worked and maintained" by the company "as an integral part of the company's undertaking;" that certain half-yearly payments should be made to the *Crystal Palace Railway Company*, and that such payments, and the property of the *Crystal Palace Railway Company*, should be subject, "as respected the creditors of that company, to the same rights and remedies as could now be enforced against the tolls and property of that company."

At this date the *London, Chatham, and Dover Railway Company* were working the *Crystal Palace Railway* line under a resolution of their own directors, without any lease or agreement; and a suit was pending against both companies by an unpaid vendor of lands of which possession had been taken by the *Crystal Palace Company* in 1864 and 1865, and upon part of which the line had been constructed. In this suit the *London, Chatham, and Dover Company* (who were made co-Defendants by amendment) had answered, pleading that they were unnecessary parties; but at the hearing, in March, 1868, it was declared that, upon default of payment within one month by the *Crystal Palace Company* of what should be certified to be due, the Plaintiffs would be entitled to a lien on the lands against both companies. Default was made by the *Crystal Palace Company*, and shortly afterwards proceedings in the suit were, by the arbitrator's first award, stayed as against the *London, Chatham, and Dover Company* only.

Upon Petition by the Plaintiffs, praying that the amount due under the above order for principal, interest, and costs, might be raised by a sale of the lands, and in the meantime for an injunction and receiver, and other relief:—

Held, that the *Arbitration Act* did not interfere with the rights of the Petitioners; and order made as prayed.

PETITION.

In 1863 the *Crystal Palace and South London Junction Railway Company* gave to the *Earl of St. Germans* notice to treat for a

piece of land containing 2A. 0R. 2P., or thereabouts, at *Lewisham*, of which the Earl was tenant for life under a settlement, dated in 1852, which contained a power of sale, now vested in *James Robertson Craufurd* as trustee; and, pending negotiations for the terms of purchase, the company, being desirous of entering upon the lands—the Earl not consenting to such entry—deposited in the bank, under the 85th section of the *Lands Clauses Act*, the sum of £504, the sum determined to be the value in fee simple of the property (subject to a subsisting lease). They also gave to the Earl a bond for the like amount.

On the 4th of February, 1864, the company entered upon the land.

The company being desirous of taking other land of which the Earl was tenant for life, for the purpose of connecting their line with the *Greenwich* branch of the *London, Chatham, and Dover Railway Company*, in anticipation of an Act of Parliament to be obtained for that purpose, entered into an agreement, dated the 6th of March, 1864, with the Earl, whereby, after stating that it was mutually desired that the amount of the purchase-money and compensation to be paid by the company for the land originally taken by them, as above-mentioned, should be determined by the sole award of *John Clutton*, as provided by the *Lands Clauses Act;* and after reciting the bill above referred to, then pending in Parliament, and that it was uncertain what quantity of land would be required for the purposes of the Act, it was mutually agreed that the price per acre to be paid by the company for taking so much land as might be required by them should be determined by the sole award of the same arbitrator, to be made at the same time as he should settle the amount to be paid for the original piece of land.

The bill above referred to was passed; and *Clutton*, by his award, dated the 4th of August, 1864, awarded £610 as the purchase-money for the piece of land originally taken, and £1300 as the amount of compensation for severance. He also awarded £300 as the amount per acre to be paid for such land as might be required for the purposes of the last-mentioned Act; and further awarded and determined that, for the accommodation of the adjoining property of the owner, the company should make and

V.-C. B. 1871 — EARL ST. GERMANS v. CRYSTAL PALACE RAILWAY CO.

maintain a convenient bridge over the railway, of specified width, and that the making of such bridge should be commenced on or before the 25th of December, 1864, and be erected on or before the 25th of December, 1865.

The quantity of land required by the company turned out to be three roods and three perches, and the amount of purchase-money to be paid for the same was £296 5*s.*

In March, 1865, the company entered upon the second piece of land.

The line was opened on the 1st of August, 1865.

The company not having paid the three sums of £610, £1300, and £296 5*s.*, and not having commenced the accommodation works, Earl *St. Germans* and Mr. *Craufurd*, on the 19th of February, 1867, filed a bill against the *Crystal Palace Railway Company*, stating the above facts, that possession had been taken without their consent, and that repeated applications had been made in vain for payment; and praying for specific performance of the agreement, by payment of the £2206 5*s.*, and interest, from the respective dates of entry; for construction of the works; for payment out to the Plaintiff *Craufurd* of the sum of £504 in part discharge of the sum due; that the amount unpaid by the company might be declared to be a lien on the lands, and that, if necessary, the same might be enforced or realised by sale or otherwise; for a receiver of the tolls and profits of the undertaking, and of the lands and revenues of the company; for costs, and further relief.

The Defendants, the *Crystal Palace Company*, answered on the 12th of July, 1867, admitting that they were in possession, but stating that their line was worked, and the rolling stock provided by, the *London, Chatham, and Dover Railway Company*, and submitting whether the last-named company ought not to be made parties to the suit.

On the 23rd of October, 1867, the bill was amended by making the *London, Chatham, and Dover Company* co-Defendants; stating that the undertaking was vested in the last-named company, or that the last-named company were otherwise interested in the matters in question, and were necessary parties; and praying the same relief as before against both companies.

On the 24th of December, 1867, the *London, Chatham, and Dover Company* answered, stating that under the authority of a resolution passed by a committee of directors, the company consented to work, and had ever since July, 1865, worked, and were then working, the *Crystal Palace* line, so far as such line was completed, and that the tolls and rates arising from the traffic of the line were received by them, and the balance, if any, after payment of working and other expenses, would be payable to the *Crystal Palace Railway Company;* that, other than the above mentioned resolution, there was no subsisting agreement between the two companies as to the working of the line; and that they had never in any way recognised or adopted the award. They insisted that "the Plaintiffs are not entitled, as against us, to any part of the relief prayed by their bill, and that we are altogether unnecessary parties to this suit."

The cause came on upon motion for decree before Lord Justice (then Vice-Chancellor) *James*, on the 17th of March, 1868; and the Court declared that the agreement ought to be specifically performed, and ordered and decreed the same accordingly; and the Defendants declaring themselves content with the title, it was ordered that the £504 cash should be paid out to the Plaintiff *Craufurd* as trustee, that an account be taken of what was due to the Plaintiffs for principal and interest at £5 per cent. from the days of entry, and that £5 per cent. should be computed on the sum of £504 up to the day of payment out, and on the balance of principal moneys up to the day of payment; that the Plaintiffs' costs should be taxed, and the sum of £504 deducted from what should appear to be due, and the balance certified; that the balance be paid by the *Crystal Palace Railway Company* within one month of the certificate, and thereupon a conveyance executed. In default of such payment, the Court declared that the Plaintiffs would be entitled to a lien on the said hereditaments, "both against the Defendants the *Crystal Palace Railway Company*, and the Defendants the *London, Chatham, and Dover Company*," for what should be certified to be due; with liberty to the Plaintiffs to apply in Chambers to enforce such lien; and general liberty to apply.

On the 12th of July, 1869, was passed the *London, Chatham, and*

V.-C. B. 1871 EARL ST. GERMANS v. CRYSTAL PALACE RAILWAY CO.

Dover Railway (Arbitration) Act, 1869 (32 & 33 Vict. c. cxvi.), whereby arbitrators were appointed. By sect. 17, amongst the matters referred to the arbitrators, were the following: "The legal and equitable rights and interests of . . . companies . . . whose lines . . . are worked by the company, and the arrangements or agreements which ought to be made between any of such companies . . . and the company" "the legal and equitable rights, liens, and priorities of . . . any person or persons having or claiming any lien, charge, or incumbrance upon any lands in which the company is interested" . . . and "all matters in question as between all the parties in all . . . suits and other proceedings . . . in equity in which the company is a party, as co-Defendant" . . . and the section enacted that "the powers of the arbitrators shall extend . . . to ascertain and determine the matters aforesaid" . . .

By sect. 18, after a recital that the *Crystal Palace Railway* had, since the opening thereof, been "worked and maintained by" the *London, Chatham, and Dover Railway Company*, under certain agreements, the validity of which was disputed, and that it was expedient that the said railway should "form part of the system of the company, and be worked and maintained by the company," it was enacted that "the said *Crystal Palace and South London Junction Railway*, and any extension thereof authorized in the present session of Parliament, shall be worked and maintained by the company as an integral part of the company's undertaking." It was also provided, that all claims, disputes, questions, and differences subsisting between the companies, and when and how, and out of what funds or stock, any balance found to be due by one of the companies to the other should be paid, should be referred to the arbitrators, and should be by them determined; and that the arbitrators should further ascertain and determine what proportion of the net earnings accruing to the company from the local traffic of the *Crystal Palace Railway*, or traffic passing to or from the *Crystal Palace Railway*, or any portion of the system of the company, should be attributed to the *Crystal Palace Railway* as rental; . . . and that the arbitrators should, in forming their decision, have regard to all the circumstances of the case; and that the company should pay half-yearly to the *Crystal Palace Company* the amount which should become due to them under the award of the arbitrators

in respect of the traffic of the previous half year; "and such half-yearly payments, and the property of the *Crystal Palace Company*, shall be subject, as respects the creditors of that company, to the same rights and remedies as could now be enforced against the tolls and property of that company."

Sect. 23 enacted that "all . . . suits . . . and proceedings which at the passing of this Act shall be pending in, or under appeal from, any Court of Law or Equity in *England*, in respect of matters or things declared by this Act to be subjects of arbitration, shall be transferred to, dealt with, and decided by the arbitrators, as if the same had been originally instituted before the arbitrators."

Sect. 26 enacted that, from and after the passing of the Act, and until a final award had been made, all civil jurisdiction vested in or exerciseable by any Court of judicature in or over the company, and the estate and effects of the company, and in all causes, suits, and matters to which the company were parties in respect of matters affecting the company, should belong to and be vested in the Crown, and that such jurisdiction should be exerciseable by the arbitrators.

Pursuant to the decree of March, 1868, the £504 was paid out to the Plaintiff *Craufurd*, and by the Chief Clerk's certificate, dated the 5th of August, and signed and approved on the 21st of December, 1867, there were found due to the Plaintiff *Craufurd* various sums for principal and interest, amounting altogether to £2365 13*s.* 9*d.*

The *Crystal Palace Railway Company*, having made default, were, by an order dated the 18th of March, 1870, ordered to pay the above sum on or before the 18th of April, 1870.

By the first award of the arbitrators, dated the 18th of August, 1870, it was awarded (par. 46) that (amongst other suits and proceedings) the suit of Earl *St. Germans* v. *Crystal Palace Company* should be, and the same was, thereby absolutely stayed, but only as against the *London, Chatham, and Dover Company.*

The present Petition was now presented in the suit by Earl *St. Germans* and Mr. *Craufurd*, stating the above facts, that the above sum had not been paid nor the accommodation works constructed, and praying for an account of what was due to the

V.-C. B. 1871 — EARL ST. GERMANS v. CRYSTAL PALACE RAILWAY CO.

Petitioners under the last-mentioned order, for principal, interest, and costs, and that the same might be raised by a sale of the lands of the Petitioners taken by the company, or a competent part thereof; that, in the meantime, the company might be restrained from continuing in possession of the lands; for a receiver of the tolls, rents, and profits, and lands and revenues of the company; for a reference to Chambers, to ascertain the amount of damage and loss sustained by reason of the non-construction of the accommodation works, and payment; and, in default of payment, that the Petitioners might be declared entitled to a lien on the hereditaments for such amount, or so much as should remain unpaid.

After the Petition was served, the Petitioners' solicitors received a letter dated the 2nd of December, 1870, from the company's solicitors, informing them that, by an order made in the Chambers of Vice-Chancellor *Bacon* on the 23rd of September, 1870, in the suit of *Dowie* v. *Crystal Palace Railway Company*, Mr. *William Shelford* and Mr. *Gerrard Johnson*, the secretary of the company, were appointed receivers of all the tolls and receipts in respect of, or arising from, the *Crystal Palace* undertaking. They added: "We think it well also to call your attention to the 18th section of the *London, Chatham, and Dover Railway (Arbitration) Act*, which provides that the *Crystal Palace* line shall be worked as an integral portion of their system. We imagine, therefore, that it is not competent for the Court to direct the sale of any part of the land on which the line is actually constructed."

Mr. *Kay*, Q.C., and Mr. *Jones-Bateman*, for the Petitioners:—

We are warranted in asking for an injunction and receiver by the decision of Vice-Chancellor *Stuart*, made upon motion for decree in *Bishop of Winchester* v. *Mid-Hants Railway Company* (1). In *Williams* v. *Great Eastern Railway Company*, before Vice-Chancellor *Stuart*, May 5, 1868, after a decree for peremptory payment within fourteen days, and default, the same learned Judge, on Petition, made an order for sale on non-payment within a month.

Walker v. *Ware, Hadham, and Buntingford Railway Company* (2) decides that an unpaid vendor of land of which the company is

(1) Law Rep. 5 Eq. 17.

(2) Law Rep. 1 Eq. 195.

in possession, has a lien on the land for the purchase-money, and for compensation-money for severance, which lien the Court will enforce by sale, though the line is open for public use. The decision was referred to, approved, and followed, in *Wing* v. *Tottenham and Hampstead Junction Railway Company* (1), and again in *Raper* v. *Crystal Palace Railway Company*, before the Master of the Rolls, February 7, 1868.

A vendor has the same rights against a company as against any other insolvent purchaser; and when a purchaser is in possession he may be ordered, even before answer, to pay the money into court: *Dixon* v. *Astley* (2); *Blackburn* v. *Stace* (3); especially if he has dealt improperly with the estate: *Gibson* v. *Clarke* (4); *Pope* v. *Great Eastern Railway Company* (5).

As to the right to a lien for damages, they cited *Hindley* v. *Emery* (6).

Mr. *Ferrers*, for the company:—

The Court has no jurisdiction to make the order asked for.

The Petitioners, finding that they cannot proceed in their suit against the *London, Chatham, and Dover Company*, who are the real Defendants, seek to attain their object by getting a decree made against us.

Ours is a line "worked by the company," the Plaintiffs claim a lien upon "lands in which the company is interested," and the company are "co-Defendants." Hence, by the 17th section, the subject-matter of the suit has been withdrawn from this Court, and is now wholly within the powers of the arbitrators.

The *London, Chatham, and Dover Company* have pleaded that they are unnecessary parties to the suit; but that contention cannot be maintained now that, by the 18th section, our line is to be "worked and maintained by" that company "as an integral part" of their undertaking.

All control over our line has been taken from us. We have no funds in hand, and have been unable to obey the order; but, if we are technically in default, and the Petitioners, according to the course

(1) Law Rep. 3 Ch. 740.
(2) 1 Mer. 133.
(3) 6 Madd. 69.
(4) 1 Ves. & B. 500.
(5) Law Rep. 3 Eq. 171.
(6) Ibid. 1 Eq. 52.

V.-C. B. 1871

EARL ST. GERMANS v. CRYSTAL PALACE RAILWAY CO.

of the Court, are entitled to this order, it cannot properly be made in the absence of the *London, Chatham, and Dover Company.*

The Petitioners should have applied to the arbitrators.

As to the prayer for damages, it appears they were not prayed for by the bill; and this is only an attempt to amend the bill in that respect.

Mr. *Kay*, in reply:—

The provision in the *Arbitration Act* is only that actions and suits against the *London, Chatham, and Dover Company* shall be stayed. The effect cannot be that the Petitioners are to be deprived of the benefit of a decree made before the Act was passed, at a hearing at which the *London, Chatham, and Dover Company* were present.

The *London, Chatham, and Dover Company* hold no lease of the line; they have no estate in the land; there is nothing but the enactment, that the line "shall be worked and maintained" by them. An unpaid vendor's rights against the purchasing company cannot be interfered with by a working agreement entered into by the company with some one else.

A prayer for damages is unnecessary: *Catton* v. *Wyld* (1).

Mr. *Ferrers* observed that, in a note to *Morgan's* Chancery Acts and Orders (2), it is stated, by way of exception to *Catton* v. *Wyld* and *Curriers' Company* v. *Corbet* (3), that if a decree has been made giving equitable relief, a supplemental question as to damages cannot be entertained without a supplemental bill: *Corporation of Hythe* v. *East* (4).

The VICE-CHANCELLOR said that, if the decision went no further than that, it would not assist the Respondents. A supplemental bill was not needed.

SIR JAMES BACON, V.C.:—

I think the Petitioners are clearly entitled to the order which they ask for.

(1) 32 Beav. 266.
(2) 4th Ed. 261.
(3) 2 Dr. & Sm. 355.
(4) Law Rep. 1 Eq. 620.

The only ground of opposition—I do not say defence—is that which Mr. *Ferrers* has suggested from the *Arbitration Act.*

Now, in the first place, that Act of Parliament was passed with no intention of interfering with the rights of any one except the *London, Chatham, and Dover Railway Company* and those who had entered into agreements with them. It did not mean to take away from others rights of which they were already possessed. By the decree pronounced in this suit, not long before the passing of the *Arbitration Act,* the rights of the Petitioners were established; the right of lien was declared even against the *London, Chatham, and Dover Railway Company,* and those rights are not affected in the slightest degree by any words in the Act of Parliament.

It would be the wildest thing possible to suppose that the Legislature intended, by anything short of express terms, to take away from the Petitioners, who have established their right by a decree in this Court, any portion of that to which they are entitled.

The *London, Chatham, and Dover Railway Company,* by their answer, insisted that they had no interest in the suit, and they insisted successfully; but, they still being parties to the suit, and being present at the hearing, the Petitioners' lien was declared against them as well as against the original purchasers.

Nothing, in my opinion, can be more plain than the right which the Petitioners assert, and which has not been disputed in any degree, except by the suggestion which, unfortunately for all parties, is too true, that the *Crystal Palace Railway Company* have not, at present, the means of satisfying the just demand which is made against them; and by the suggestion of the notion that this Act of Parliament, passed for a totally different object, and carefully guarding, in the 18th section, against the possibility of its being wrested to such a purpose as has been attempted on behalf of the Respondents to-day, is a protection to the *Crystal Palace Railway Company* against satisfying that just demand against them which this Petition seeks to enforce.

In my opinion, the order must be according to the prayer of the Petition.

V.-C. B. 1871 EARL ST. GERMANS v. CRYSTAL PALACE RAILWAY CO.

Mr. *Ferrers*:—A receiver has been already appointed.

Mr. *Kay*:—That makes no difference; the Petitioners are not asking for a receiver of the tolls of the railway. The receiver was appointed at the suit of a debenture-holder to receive the tolls of the railway. We are asking for a receiver of this particular land until it is sold.

The VICE-CHANCELLOR assented to this view; and the order was made according to the prayer of the Petition.

Solicitors for the Petitioners: Messrs. *Bennett, Dawson, & Bennett.*

Solicitors for the Respondents: Messrs. *Markby & Tarry.*

V.-C. B. 1871 March 4, 9.

In re INGLE'S TRUSTS.

Will—Legacy—Misdescription of Object—Difference between Equivocation and Misdescription—Evidence.

6 H.L. 275

Testator devised and bequeathed his real and personal estate to trustees absolutely, upon trust, as to one moiety of the personalty, to pay and divide the residue equally between and amongst his nephew *John* and his niece *Hannah* (whom he described as the children of his late brother *Joseph*), "and all and every the children of my late nephew *Mark Ingle* and my niece *Eliza Wheelwright*," share and share alike. He then desired his trustees to stand possessed of a moiety of the proceeds of the sale of his realty, upon trust to divide the same, as before mentioned.

In a codicil, testator referred to the "legacy left and apportioned to my niece *Eliza*."

Some years before the date of the will a brother of the testator, named *Mark*, had died, leaving three sons, the two Petitioners and a third son, named *Mark*. The evidence shewed that, at the testator's death, the nephew *Mark*, who had had a son born to him in *England*, and had emigrated to *America*, where he had another child, was still living; also, that the testator knew of the birth in *England* of the child of *Mark*, and of his emigration to *America*, and that from some circumstances he (the testator) had, shortly before the date of the will, been led to suppose that *Mark* might be dead:—

Held, that by the words "my late nephew *Mark*," the testator meant his (living) nephew *Mark*, and not his late brother *Mark*:

Held, also, that, there being only one living person answering to the name

Mark Ingle, this was not a case of equivocation, and that evidence of intention was not admissible:

Held, further, that by the words "and my niece *Eliza*," the testator intended a gift to *Eliza*, and not a gift to the children of *Eliza*.

PETITION.

William Ingle, of *Leeds*, by his will, dated the 16th of March, 1860, devised and bequeathed nineteen messuages or dwelling-houses at *Leeds*, his personal chattels, moneys, debts, and all other his real and personal estate whatsoever and wheresoever, to trustees, their heirs, executors, administrators, and assigns, upon trust to call in his personal estate, and thereout pay his debts, funeral and testamentary expenses, and divide the residue into moieties; and as to one moiety, "to pay and divide the same unto and equally between *Elizabeth Stephenson* and *Daniel Wilson* the younger, the children of *David Wilson*, of *Leeds*;" and as to the other moiety, to pay the three legacies thereinafter bequeathed, and then "to pay and divide the residue thereof unto and equally between and amongst my nephew *John Ingle* (of *Leeds* aforesaid, hairdresser), and my niece *Hannah*, the wife of *Charles Kitching*, of *Leeds* aforesaid, hairdresser, formerly *Hannah Ingle* (the children of my late brother *Joseph Ingle*), and all and every the children of my late nephew *Mark Ingle* and my niece *Eliza Wheelwright*, share and share alike."

He then desired his said trustees to make sale of his real estates, and stand possessed of the proceeds, in trust to pay one moiety of the moneys to arise from the sale of ten of the houses, specifying them, unto and equally between the said *E. Stephenson* and *D. Wilson* the younger, share and share alike; and as to the other moiety of the moneys to arise from the sale of the ten houses, and all the rest and residue of the moneys to arise from the sale of his other real estates, upon trust "to pay and divide the same unto and equally between and amongst the said *John Ingle* (of *Leeds*), *Hannah*, the wife of the said *Charles Kitching*, and the said children of my late nephew *Mark*, and my said niece *Eliza Wheelwright*, share and share alike, to and for their, his, and her own absolute use and benefit."

By a third codicil, dated in November, 1863, he directed his executors to deduct from off "the legacy left and apportioned to

V.-C. B. 1871 *In re* INGLE'S TRUSTS.

my niece *Eliza Wheelwright*," the sum of £45, in consideration of his having paid that sum for her recently.

No legacy was left by the testator to *Eliza Wheelwright*, except as above stated.

Eliza Wheelwright died a widow on the 14th of November, 1864, in the testator's lifetime, leaving three children, *Eliza*, *Ellen*, and *Mary Ann*, wife of *Benjamin Broadfoot*.

Testator died on the 23rd of May, 1865. His eldest brother, named *John*, had an only son named *John*. Both predeceased him; but his nephew *John* left one surviving son, named *Edmund*, who was testator's heir-at-law.

Testator had a brother named *Mark*, who died in his lifetime, on the 6th of August, 1848, before the date of the will, leaving three sons, the two Petitioners *John* and *Joseph Ingle*, and *Mark Ingle*, who, in the year 1847, emigrated to *America*, where, according to the latest news, he was still living, having two children, a son named *John*, and a daughter named *Elizabeth Crompton Ingle*.

At the date of his will, testator had had one nephew named *William*, who died on the 25th of December, 1855, leaving one child, *Alice*, now the wife of *Samuel Midgley*.

The testator's real estates had been sold, and his personal estate converted and got in; Mrs. *Stephenson* and *David Wilson* had been paid, and there remained in the hands of the trustees £201 8*s*. 6*d*. in respect of a moiety of the residue of the testator's personalty, and £981 3*s*. in respect of a moiety of the residue of the proceeds of his realty; of each of which two sums one-sixth had been paid to *John Ingle* (of *Leeds*) and another sixth to *Hannah Kitching*, leaving four-sixths in the hands of the trustees.

On the 22nd of September, 1868, the trustees filed an affidavit stating the above facts, and that they proposed to pay the sums of £131 5*s*. 8*d*. and £654 2*s*. into Court. This they accordingly did, and the amount was invested in £848 3*s*. stock.

The present Petition was then presented by *John* and *Joseph Ingle*, claiming to be entitled, each of them, to one-fourth of the fund in Court, on the ground that, by the children of his late "nephew" *Mark Ingle*, the testator meant the children of his late "brother" *Mark Ingle*.

The Petition prayed for sale of the stock and distribution of the

funds, after payment of costs, on the footing of the above claim, and also on the view that the bequest comprised in the words "and my niece *Eliza Wheelwright*" was a bequest not to the children of Mrs. *Wheelwright*, but to Mrs. *Wheelwright* herself, which lapsed by her death, and passed, as to the realty, to the heir, and as to the personalty, to the next of kin.

The Respondents were the trustees; the heir-at-law, *Edmund Ingle;* the next of kin within the jurisdiction (other than the Petitioners), namely, *John Ingle* (of *Leeds*), Mrs. *Kitching*, and *Ann*, *Ellen*, and *Jane Horsman;* also the husband of Mrs. *Kitching;* *Samuel Midgley*, and *Alice* his wife; *Eliza* and *Ellen Wheelwright;* and *Benjamin Broadfoot* and *Mary Ann*, his wife.

On the 18th of December, 1869, Lord Justice (then Vice-Chancellor) *James* directed the Petition to stand over, with liberty to serve upon the parties in *America;* and this had been done.

From an affidavit of *Mark Ingle*, of *Pleasant Valley*, *Litchfield* County, State of *Connecticut*, sworn on the 8th of July, 1870, it appeared that he was married at *Todmorden*, *Lancashire*, in March, 1842, and that his son *John* was born at *Rochdale*, in *England*, and his daughter in *America*. Previous to his emigration in 1848, he was on the best terms with his uncle, the testator. When he left the testator gave deponent to understand that he would remember him in his will. Deponent ceased to correspond with the testator, but he corresponded with his own brothers, the Petitioners, and with his wife's sister, Mrs. *Elizabeth Oaker*.

He had reason to believe that the testator must have known of the birth of both of his two children from his brothers or his wife's sister. He received a letter (A) from the Petitioner *John Ingle*. He himself, before emigrating, made known to the testator the fact of the birth of his son.

Deponent received a letter (B), which was in the handwriting either of Mr. or Mrs. *Oaker;* also other letters (marked C, D, E, F, G, and H), from which he had reason to believe as follows: that in 1855 his relatives in *England* had not heard from him for some time, and had reason to believe him to be dead; that in March, 1860, the testator supposed him to be dead, and knew then and in May, 1860, that he had children; and that the testator was not on friendly terms with the Petitioners.

V.-C. B. 1871 *In re* INGLE'S TRUSTS.

Letter (D) was dated "*Milledgville*, the 20th of March, 1853," and addressed by *James Pickup* to *Mark Ingle*, informing him as follows: "I have a letter for you from *England*; your friends have wrote to you, and had their letter returned to *England*."

Letter (E) was dated the 2nd of July, 1853, and addressed from *Seco* (*Me.*), by the same to the same. The writer said: "I got a letter from *Joseph Oaker* in April, requesting me to forward it to you, so I sent you a letter to inform you, and another to *George Crampton* to find out where you was. I got an answer from *George*, but I concluded not to send you this till I heard from you. I thought you neglected to look after them. It appears *Joseph Oaker* sent you a letter a year ago, and after lying about here some time it was sent back to *England*."

Letter (F) was dated "*Yantic*, Feb. 9, 1855," and addressed by *Henry Holt* to *Mark Ingle*. He said: "Your brothers and sisters are very uneasy about you, and would be very glad to hear from you. They have sent letters to you, and have received no answer."

(G) was a letter dated the 5th of November, 1857, and addressed from *Fieldhouse*, near *Rochdale*, by *John Ingle* to *Mark Ingle*. He said: "I only can tell you that your uncle *William* and wife are living, and getting very old; and you must not think of having any fortune from them . . . Your brother *Joseph* was over last August, and he told me that they did not make much of him, as you may see they are getting very old, and want nobody to trouble them."

The following is an extract from letter (B):—

"*Rochdale*, 4th March, 1860.

"Dear Brother and Sister, ... I have seen your brother *Joseph Ingle*, and he had been into *Yorkshire* to see your uncle *William*, the only uncle you have got in *Yorkshire*; and he has asked how many their was living on you, and so I told him that you was living in *America*, and he asked how long it was since we heard from you, and I told him it was better than two years ago, and he said why he might be dead with not hearing from you so long, and I think that sooner you write and the better your brother *Joseph* is doing very well . . . ."

The letter concluded: "I remain, your brother and sister, *Joseph Oaker* and *Elizabeth Oaker*."

The following are extracts from letter (C):—

"*Balderstone*, June 20th, 1861.

"Dear Brother, ... I have been over to my uncle *William's* at *Leeds* several times since you left *Rochdale*. I was there last May on the 21th and two following days, and he was very glad to see me, and he asked me if you was still living, and doing well and all the family. . . . *Hannah Ingle* is rent-collector for my uncle; he told me that when anything happened him he should not forget us, as I am very sorry that I have not written sooner and let you know, so that I could have taken all particulars as he is so anxious to know how you are getting on . . . .

"I remain, your brother, *Joseph Ingle*."

The letter (A) was dated "*Fieldhouse*, the 6th of October, 1865," and signed "*John Ingle*." The writer said that since the 3rd of July he had had a letter from the trustees "wanting to know how many children you had; so I told them you had two—one, a son *John*, and one daughter *Elizabeth*, and *John's* age was twenty-three years, and *Elizabeth*, September 4, 1865, would be thirty years old. I cannot tell the reason that they want to know that, but I have not heard anything since."

Affidavits had also been filed by *Hannah Kitching* and the Petitioners, tending to shew what was the intention of the testator, from alleged conversations, the intimate terms with the testator in which the Petitioners said they stood, and the degree of information about their brother *Mark*, which they said they constantly supplied to the testator. The evidence was read, but not admitted.

Mr. *Fry*, Q.C., and Mr. *Humphry*, for the Petitioners:—

The question turns upon the construction of the (repeated) expression, "the children of my late nephew *Mark*." At the date of the will, testator had a "late" relative named *Mark*, but he was not a "nephew;" he had also a "nephew" *Mark*, but he was not "late," being still living. He had likewise a "late nephew," but he was named *William*. Under these circumstances, we say that, as the description, if intended to apply to *Mark* the brother, was

V.-C. B. 1871 *In re* Ingle's Trusts.

erroneous, inasmuch as he is styled "nephew," and if intended to apply to *Mark* the nephew, was equally erroneous, inasmuch as he is described as "late," there is a complete equivocation; and in such a case the Court will admit evidence of the testator's intention, according to the ruling of Sir *W. Grant* in *Careless* v. *Careless* (1), followed by *Doe* v. *Hiscocks* (2), where Lord *Abinger* says (3): "They" (the cases of *Careless* v. *Careless* and two others) "differ, indeed, in this, that the equivocal description is not entirely accurate; but they agree in its being (though inaccurate) equally applicable to each claimant. . . . These, therefore, may fairly be classed also as cases of equivocation; and in that case evidence of the intention of the testator seems to be receivable." *Grant* v. *Grant* (4) supports the same view. Amongst the classes of evidence which are admissible in cases of equivocation, are declarations made after the date of the will: *Doe* v. *Allen* (5); *Bradshaw* v. *Bradshaw* (6).

The Vice-Chancellor asked whether this could be considered a case of equivocation, inasmuch as there was a person at the testator's death answering the description "my nephew *Mark*," though that person was inaccurately described as "late."

Mr. *Fry*:—The adjective "late" is just as operative for the purpose of description as the substantive "nephew."

That evidence of the surrounding circumstances at the date of the will is admissible will, probably, not be disputed.

[They also cited the following cases: *Bristow* v. *Bristow* (7); *Ryall* v. *Hannam* (8); *In re Gregory's Settlement* (9); *Still* v. *Hoste* (10); *Bennett* v. *Marshall* (11).]

Mr. *Kay*, Q.C., and Mr. *Martineau*, for the children of *Mark Ingle*, the nephew:—

Upon the question of admissibility of evidence, it is expressly laid down in *Doe* v. *Hiscocks*, that there is but one case in which

(1) 1 Mer. 384.
(2) 5 M. & W. 363.
(3) Ibid. 370.
(4) Law Rep. 5 C. P. 380.
(5) 12 A. & E. 451.
(6) 2 Y. & C. Ex. 72.
(7) 5 Beav. 289.
(8) 10 Ibid. 537.
(9) 34 Ibid. 600.
(10) 6 Madd. 192.
(11) 2 K. & J. 740.

evidence of intention can be properly admitted; and that is, where the meaning of the testator's words is neither ambiguous nor obscure, but where from the circumstances admitted in proof an ambiguity arises—as, for instance, where there are two persons of the same name, or two persons to both of whom the description will correctly apply. *Careless* v. *Careless* (1) was a perfect case of equivocation. So in *Wigram* on Extrinsic Evidence in Interpretation of Wills (2), it is laid down that "the only cases in which evidence to prove intention is admissible are those in which the description in the will is unambiguous in its application to each of several subjects."

Here there is a nephew *Mark* to whom the description will apply. No doubt he is misdescribed as "late;" but this description does not, necessarily, raise a case of equivocation: *Bernasconi* v. *Atkinson* (3); *Drake* v. *Drake* (4).

It is remarkable that the testator, happening, in all other instances, to know the names of the children whom he intends to benefit, refers to them by name. In this instance he knew the names of the children of his brotlier *Mark*, and he did not know the names of the children of his nephew *Mark*. He intends to benefit the children of some one named *Mark*, and he does not name the children. The presumption is, that the children of the nephew, and not of the brother, were intended.

Both *Careless* v. *Careless* and *Bradshaw* v. *Bradshaw* (5) were referred to and explained in *Doe* v. *Hiscocks* (6).

In *Bristow* v. *Bristow* (7) the collateral evidence plainly shewed there had been a mistake. In *Ryall* v. *Hannam* (8) the decision entirely turned upon the surrounding facts. *In re Gregory's Settlement* (9) is in our favour. In *Bennett* v. *Marshall* (10) evidence was admitted. The report does not state what sort of evidence it was, and it may have been merely evidence of intention, as the case is clearly within *Doe* v. *Hiscocks*.

That the testator made a mistake of some kind must be admitted.

(1) 1 Mer. 384.
(2) 4th Ed. p. 169; pl. 194, vii.
(3) 10 Hare, 345.
(4) 8 H. L. C. 172.
(5) 2 Y. & C. Ex. 72.
(6) 5 M. & W. 363.
(7) 5 Beav. 289
(8) 10 Ibid. 537.
(9) 34 Ibid. 600.
(10) 2 K. & J. 740.

V.-C. B. 1871 *In re* Ingle's Trusts.

Inasmuch, however, as *Mark*, the brother, had been dead twelve years when the will was made, whereas *Mark*, the nephew, when last heard of at that date, was living in *America*, and it must have been uncertain whether he was living or dead, the probability of the error being in the word "late" is immeasurably greater than that of its being in the word "nephew."

Mr. *Ingle Joyce*, for the Respondents, the three daughters of Mrs. *Wheelwright*, and the husband of the married daughter:—

The clause is to be read as meaning a bequest to "the children of . . . my niece, *Eliza Wheelwright*," as in *Lugar* v. *Harman* (1).

On behalf of them and the other next of kin it is also contended that the gift of either moiety is void for uncertainty: *Drake* v. *Drake* (2).

Mr. *Freeling*, for the trustees.

Mr. *Fry*, in reply:—

In *Drake* v. *Drake*, where there was a perfect equipoise of evidence, Lord Chancellor *Brougham* held the gift void. That is not the case here.

The testator's intention was to benefit all his nephews and nieces. The analogy of the passage shews that *Mark*, the brother, was meant.

The evidence shews the great degree of intimacy which subsisted between the testator and the Petitioners, making it extremely improbable that he intended to exclude them.

Upon the whole, the word "nephew" is to be rejected rather than the word "late."

Sir James Bacon, V.C.:—

Of all the cases which come before the Court for its decision, none can be more embarrassing and more unsatisfactory than those which arise upon the construction of wills. The Court has no real guide to enable it to arrive at a conclusion. The only things which can be called guides are certain rules which the Court has

(1) 1 Cox, 250. (2) 8 H. L. C. 172.

laid down, and which may be extracted from the decisions. Beyond that, the decisions are not of the slightest use. Except by adherence to those rules, there is nothing but what may, not irreverently, be called guessing as to what the words of the documents can be held to mean.

The rule that evidence of intention is not admissible, I find clearly and plainly decided and expressed. So that, upon all occasions subsequent to those decisions, there ought to be no doubt about its application. It is in cases of equivocation merely, to put it in the shortest form, that evidence of intention is admissible.

That evidence of surrounding circumstances is always, or almost always, admissible, is equally unquestionable.

In this case I can conceive no ground upon which evidence of intention ought to be admitted. I do not think that any evidence of intention has been adduced, except that one suggestion in the affidavit of the Petitioners, and which is nothing more than a vague notion that the testator meant to provide for all of them. I do not find a particle of evidence of intention, although that evidence was attempted to be introduced. But, in my opinion, the attempt cannot succeed, because in this case I can find no such equivocation as that which is admitted to be necessary in order to introduce evidence of intention. The words of the will in that particular respect are these: "All and every the children of my late nephew *Mark*." It is said that some of these words may be dropped out in order to introduce an equivocation; that if the sentence be read, "All and every the children of *Mark Ingle*," there is no equivocation whatever. Now, in a different state of circumstances, it might have been necessary to ascertain what *Mark Ingle* was meant, or who was meant by "*Mark Ingle*." But here there is no equivocation, for there are no two persons of the name of "*Mark Ingle*." When *Mark Ingle's* father was alive, there were two persons of that name; but at the time when this will was made, there were not. It is said that I ought, as in *Careless* v. *Careless* (1) it was insisted should be done, so to deal with some of the words as to produce a case of equivocation. But I cannot apply that process to the words of this will.

Excluding, therefore, any evidence of intention (and it is not

(1) 1 Mer. 384.

V.-C. B. 1871 *In re* INGLE'S TRUSTS.

necessary to repeat that, in my opinion, there is no evidence of intention), all that is left is, the construction to be put upon the words of the will, assisted, as that construction may well be, by a consideration of the surrounding circumstances. The surrounding circumstances insisted upon are, that the testator knew that his brother *Mark* was dead—which is clear; that he was well acquainted with the Petitioners, and their brother *Mark*, since the death of *Mark* the father—that also is true; that he did not know that his nephew *Mark* was dead, but must be assumed, on the contrary, to be taken to have known that he was alive—that last proposition is, I think, not borne out by the evidence; and further, that he never saw any of the children of *Mark*—that is perfectly true.

What is the evidence of the surrounding circumstances? *Mark* had left this country in the year 1848, and there had been no direct communication between him and his uncle, the testator, from that time to the date of the will, and further than that to the date of his death. But it is stated in *Mark's* affidavit, and not attempted to be disputed, that he had a child born before he left *England*, and that the fact of that child's birth was communicated to and known by the testator. Other circumstances are these: the testator had several relations, amongst others, *Joseph* and *John Ingle*, the Petitioners, who were in frequent communication with him and visited him as their uncle, and whom he received and communicated with as his nephews. Another of the surrounding circumstances, admission of which has been in some degree objected to, is *Oaker's* letter. Although that letter may not of itself be receivable as evidence, still I think the use which is made of it and of its contents in the affidavit of *Mark Ingle* compels me to listen to it. It appears that there was a communication (the letter speaks of one only) between the writer of that letter and the testator, in the course of which the existence of *Mark* was spoken of problematically. The writer of the letter says he told the testator that he had had no communication from *Mark Ingle* for two years, whereupon the observation of the testator was: "He may be dead for anything that you know." This is the degree of information and knowledge (and I believe I have exhausted the whole) which the testator possessed at the time he set about making his will.

Well, then, the Court has only the words of the will before it

to enable it to pronounce an opinion upon the questions raised. The will provides for the division of a certain portion of his property "between and amongst my nephew *John Ingle* (of *Leeds* aforesaid, hairdresser), and my niece *Hannah*, the wife of *Charles Kitching*, of *Leeds* aforesaid, hairdresser, formerly *Hannah Ingle* (the children of my late brother *Joseph Ingle*), and all and every the children of my late nephew *Mark Ingle* and my niece *Eliza Wheelwright*."

The contention on Mr. *Fry's* part is, that I must substitute the word "brother" for the word "nephew," which I find in the will; and Mr. *Humphry's* argument was, that it would be unreasonable to suppose that the testator, who had had no quarrel with his nephews *Joseph* and *John*, and who was in communication with them, when he is found to be providing for nephews and nieces, can be supposed to have meant to exclude these two nephews, with whose persons he was familiar, and whose names he knew perfectly well.

But I find that that is exactly what he does; for when he has to provide for a nephew and a niece, he names them explicitly, and names the parent of whom they were born; and then he provides for children unknown to him, children (as I read it) of his nephew *Mark Ingle*.

The word "late," which is there introduced, does not alter my opinion as to the effect of the other words. If "late" is to be read as if it were "deceased," the testator was under a mistake. But how can it be said that he was under a mistake when, having provided for his nephews by name, he provides for the children of another person whom he calls his nephew, and then provides for his niece *Eliza Wheelwright* also by her name? If the word "late" in all cases means "deceased"—as must necessarily be admitted—probably the explanation of it is, that the testator used the expression with a degree of uncertainty, without understanding distinctly what it meant.

Whatever the motive or inducement was, I am reduced to construe the words of the will. I find, not a general distribution between nephews and nieces, but a selection of a nephew and niece, the children of a deceased brother; the children not of any nephew or niece, but the children of a late nephew and an existing niece.

Having given all the weight that it is proper in my judgment to

V.-C. B. 1871 *In re* INGLE'S TRUSTS.

give to the collateral evidence, I think the will can only be read as a gift to all and every the children of the testator's nephew *Mark Ingle;* it being impossible for the testator, if he understood the meaning of the words employed in the will (and he must be taken to have understood them), ever to have confused his brother, who had been dead for years, with his nephew, whose existence at that time was uncertain, as has been proved. I say "proved," because the testator's observation is proved: "You have not heard of him for two years; for anything you know he may be dead."

Looking at it in that point of view, I do not think the construction is open to any considerable difficulty. I am of opinion that all and every the children of the testator's living nephew *Mark*, not of his deceased brother *Mark*, are entitled to that share of his estate which by his will he bequeathed to "the children of my late nephew *Mark Ingle.*"

There will be a declaration to that effect; and the costs of all parties, as between solicitor and client, will come out of the estate.

Mr. *Kay* asked that the costs might be paid out of that part of the fund which was bequeathed to *Eliza Wheelwright*, and which had lapsed, and become undisposed of, on the ground that this was the portion of the fund which had given rise to a material part of the contest.

The VICE-CHANCELLOR said he could not make so fine a distinction.

Mr. *Joyce* asked the Court to make a declaration that the legacy was a legacy to *Eliza Wheelwright*, and not to her children.

The VICE-CHANCELLOR assented.

Solicitors for the Petitioners and the Trustees: Messrs. *Torr, Janeway, & Co.*

Solicitors for the other Respondents: Messrs. *Emmets, Watson, & Emmet.*

SEATON *v.* TWYFORD.

V.-C. B. 1870 Dec. 6.

Mortgagor and Mortgagee—Agreement for Mortgage—Continuance of Loan for a certain Time—Implied Proviso that Interest be punctually paid—Equitable Plea to Action—Delay.

Where an agreement for a mortgage contains a stipulation that the principal money shall not be called in for a certain time, the Court, in settling the form of the deed, will, although the agreement be silent on the subject, insert a proviso that the postponement shall be conditional on punctual payment of interest, and, if the property be leasehold, on observance of the covenants; so that, if the mortgagor should make default in either of these respects, the mortgagee's remedies by sale or foreclosure will immediately arise.

AUGUSTUS SAMUEL TWYFORD, being possessed, as the assignee of *John Hermon*, for a term of twenty-eight years from the 25th of December, 1863, of a cottage and premises on *Wimbledon Common, Surrey*, contracted to sell the same to *William Seaton*, and the following memorandum of agreement was signed by both parties:—

"I, *William Seaton*, hereby agree with you, *Augustus Samuel Twyford*, to purchase your interest in the cottage on *Wimbledon Common*, and to pay you £500 for the same, and to take an assignment from you of the lease you hold of the said premises, you paying all outgoings up to the 9th day of May next. And I, *Augustus Samuel Twyford*, agree with you, the said *William Seaton*, on your so doing, to advance you £400 by way of mortgage on the said premises at £5 per cent. per annum, and that the same shall not be called in for the next five years, but that you may have the option of paying off the same at any time on giving me six months' notice. Dated this 24th day of April, 1868."

By a deed dated the 9th of May, 1868, and made between *Twyford* of the one part, and *Seaton* of the other part, in consideration of £500 therein stated to have been paid by *Seaton* to *Twyford*, *Twyford* assigned to *Seaton* the messuage and premises for the residue of the term of twenty-eight years, subject to payment of rent and observance of the covenants.

V.-C. B. 1870 SEATON v. TWYFORD.

By another deed of the same date, and made between *Seaton* of the one part, and *George Augustus Simpson* (who was an uncle of *Twyford*) of the other part, after reciting the original lease, and the assignment of the same to *Twyford*, and that *Seaton* had agreed with *Simpson* to borrow £400 and interest, to be secured in manner thereinafter appearing, it was witnessed that, in consideration of £100 expressed to be paid by *Simpson* to *Seaton*, *Seaton* granted and demised to *Simpson* the messuage and premises for all the residue of the term, less one day, subject to redemption on repayment on the 29th of September, 1868, of £400 and £5 per cent. interest, and further advances (if any). The mortgagor also covenanted with the mortgagee to pay the £400 on the 29th of September, 1868, and any further advances at three months from the respective dates of such advances, if required, with interest at £5 per cent. half-yearly, the first half-yearly payment to be made on the 29th of September, 1868. If default should be made in payment of any part of the principal within three months after demand in writing, or in case interest should be unpaid on any of the days whereon the same ought to be paid, or in case the mortgagor should become bankrupt, or do any act rendering the lease liable to be taken in execution, it was agreed that it should be lawful for the mortgagee to enter into possession. The mortgage also contained a power of sale.

Seaton, on this occasion, paid to *Twyford* £100 only, *Simpson* paying to *Twyford* £400, the residue of the £500.

On the 28th of March, 1870, the firm of solicitors of which *Twyford* was a member wrote to *Seaton*, reminding him that half a year's interest on the mortgage, amounting to £9 15*s.*, was due, and letters repeating the demand followed on the 20th of June and the 8th of July.

On the 11th of July *Seaton* wrote to the firm, promising a cheque for the amount within a week, which, however, was not sent.

On the 4th of August the firm again wrote, threatening proceedings; and on the 12th of August *Simpson* sued out a writ against *Seaton*, demanding payment of £1009 15*s.* 4*d.* for debt and interest, and £2 15*s.* for costs. Indorsed on the writ were the following particulars of claim:—

"1870, March 25. To amount of principal and interest due

from the Defendant to the Plaintiff upon the covenant of the Defendant contained in a certain indenture of mortgage dated the 9th day of May, 1868, £409 15*s.* 10*d.*; and the Plaintiff also claims interest on the sum of £400 from the 25th of March, 1870, till payment or judgment."

On the 18th of September, *Twyford* was applied to by *Thomas F. Mason*, the ground landlord of the premises, for two quarters' ground-rent (£60 a year); and on the 20th of September the firm wrote to *Seaton*, mentioning the receipt of this letter, and threatening ejectment.

On the 4th of October the firm were informed by *Mason* that *Seaton* had sent him a cheque for the three quarters' rent due to the 29th of September, 1870.

Declaration in the action was delivered on the 24th of October. The Plaintiff declared upon the covenant, and also on the ordinary money counts.

On the 1st of November, 1870, *Edwin Smith*, *Seaton's* then solicitor, wrote to *Twyford* a letter stating that his client had left with him £20 to pay two half-years' interest, requesting *Twyford* to let him know the amount of his costs, and offering to pay the same. The writer also requested an answer at once, as that was the last day of pleading to the action.

On the same day *Twyford's* firm replied, stating that they were instructed to compel payment of principal and interest; but that their client might be disposed to agree to a settlement on certain terms, which they proceeded to specify.

To the special count in the action, the Defendant pleaded that the alleged deed was not his; and to the rest, never indebted. Thereupon issue was joined.

Between the 3rd and 14th of November *Seaton* wrote to *Twyford*, and also to his firm, asking for a copy of the mortgage deed; but the request was not then complied with.

On the 14th *Seaton* again wrote to *Twyford*, complaining of his oppressive conduct, and accusing him of endeavouring to take an unfair advantage of the writer's confidence in him regarding the purchase. *Seaton* said: "You will recollect that I had no legal adviser acting for me, as I relied entirely on fair and honourable

V.-C. B. 1870 SEATON v. TWYFORD.

treatment at your hands." He further observed that it would seem he (*Twyford*) wanted to back out of his agreement on the ground that his uncle, *Simpson*, was not bound by it, but that it was plain that he and *Simpson* were one and the same; and that, at any rate, he would be forced to keep to his agreement.

On the 15th of November *Twyford's* firm wrote to *Smith*, acknowledging having received two letters from *Seaton*, which they had thought it unnecessary to answer; and that they should be happy to see him and confer in the matter.

On the 16th *Smith* wrote to say the proper course would be to withdraw the record, and that thereupon he would pay the £20 due for interest, with costs up to the time of the writer's former letter, and (although the writer considered his correspondents not entitled to them) costs out of pocket to that date.

On the 17th of November the action was tried, and, being undefended, judgment was given for the Plaintiff at law.

On the 28th of November *Twyford* sent to *Seaton's* present solicitor a copy of the mortgage deed.

The bill was filed on the 1st of December, 1870, by *Seaton* against *Twyford* and *Simpson*, alleging that at the date of the agreement of April, 1868, *Twyford* was acting as solicitor and agent for the Plaintiff; that the Plaintiff executed the deed of the 9th of May, 1868, fully believing that his interest under the agreement of the 24th of April, 1868, was about to be carried out by means of the assignment and mortgage; not intending or agreeing to waive such agreement; without having had it explained to him that the mortgage was inconsistent with the agreement; without independent advice or assistance; and without having perused the mortgage deed, or had it read over to him; and charging that the Defendant *Simpson* had notice of the agreement of the 24th of April, 1868; and that he and *Twyford* knew, as the fact was, that the agreement had not been waived or abandoned; and that *Simpson* had been, as the nominee and friend and relation of *Twyford*, substituted in his place and stead under the agreement, and was bound by the terms of it.

The bill prayed that *Simpson* might be restrained from proceeding to execution in the action, and from commencing or prosecuting any proceedings at law against the Plaintiff in relation

to the matters in question in the suit, and from selling or dealing with the premises comprised in the mortgage deed; that *Twyford* might be decreed specifically to perform the agreement of the 24th of April, 1868; and, if necessary, for the rectification of the mortgage deed.

On the 3rd of December the Defendant *Twyford* filed an affidavit stating that the intention, at the time the agreement of April, 1868, was signed, was that, if *Seaton* did not punctually pay the ground-rent and interest, the agreement was to be void. He denied that at the date of the agreement he was acting as solicitor or agent for the Plaintiff. He said he did not inform *Simpson* of the agreement of April, 1868, not thinking it would be a prudent thing for *Simpson* to lend the £400 for any term. He considered that the agreement was a matter entirely between *Seaton* and himself, and accordingly, prior to the execution by *Seaton* of the mortgage on the 9th of May, 1868, he explained to *Seaton* that the mortgage did not contain any clause binding *Simpson* to lend the money for a term of five years; but that he, *Seaton*, might rely on deponent's assurance that, as long as the ground-rent and interest were punctually paid, if *Simpson* should require his money, deponent would make arrangements for a transfer of the mortgage without putting *Seaton* to any expense. Deponent said that *Seaton* expressed himself satisfied with this assurance, and that no allusion was then made by him or by deponent to the agreement of April, 1868. Deponent denied the allegation in the bill above-mentioned; said that he offered to read the mortgage, but that *Seaton* said he did not wish to have the same read to him. Deponent accordingly shewed *Seaton* the mortgage, which was on a printed form, and explained the nature of it to him. Deponent further said that, considering the matter of a personal nature, he told *Seaton* he did not wish to make the usual professional charges; and that, under the circumstances, his firm would be satisfied if *Seaton* paid £12 10*s.* for the costs of the purchase and mortgage, including stamps and disbursements, and that *Seaton* declined to have any bill furnished to him. Deponent admitted that he acted as solicitor of *Simpson*.

The Plaintiff, in an affidavit filed the same day, said that, on the 9th of May, 1868, he attended at the Defendant *Twyford's* office, when the deeds of the 9th of May, 1868, were produced, ready

V.-C. B. 1870 SEATON v. TWYFORD.

prepared. "The Defendant, *A. S. Twyford*, on that occasion read to me parts of the said indenture of mortgage, but he did not explain to me that the principal money secured thereby was not to remain on mortgage for five years. He stated that the Defendant *G. A. Simpson* was a friend of his, and that he had put in his name as mortgagee instead of his own name as a matter of convenience, but that it would be all the same as if his own name had been inserted as the lender of the money, or words to that effect."

On the 6th of December, by special leave, the Court was moved, on behalf of the Plaintiff, for an injunction in the terms of the first paragraph of the prayer of the bill.

Mr. *Willcock*, Q.C., and Mr. *Terrell*, for the Plaintiff:—

The Defendant *Twyford*, having acted as the Plaintiff's solicitor in the matter of the agreement of April, 1868, was bound to have protected his interest on the occasion of the mortgage, and to have inserted a clause that the mortgage-money was to remain for five years.

Simpson, who was merely *Twyford's* nominee, having full notice of the agreement, acted inequitably in bringing the action; and the Court will restrain execution on that ground, without insisting that the money recovered in the action be brought into Court.

Mr. *Kay*, Q.C., and Mr. *E. Thurstan Holland*, for the Defendants:—

The fact of *Twyford* having acted as the Plaintiff's solicitor is denied.

Where there is a proviso in a mortgage that the money shall remain for a certain term, the common form is that the proviso is to be conditional on punctual payment of interest: *Davidson's* Conveyancing (1). Can it be held to have been the meaning of this agreement, that the Plaintiff might go on for five years refusing to pay interest?

The agreement of April, 1868, was, in fact, abandoned; and the mortgage to *Simpson* was an alteration of the whole transaction.

The Plaintiff in equity might have filed equitable pleas in the action.

(1) 2nd Ed. vol. ii. pp. 749, 750.

That a mortgagor for a term certain is bound to pay interest, or submit to a decree for foreclosure or sale, appears from *Burrowes* v. *Molloy* (1), *Edwards* v. *Martin* (2), and *Ex parte Bignold* (3).

Mr. *Willcock*, in reply:—

In the cases cited there was a breach of an express condition.

In this agreement there is no such proviso as that which occurs in the common form which has been referred to. The Plaintiff cannot, upon mere presumption, be held to have intended to accede to such a condition as this. Where an agreement is certain, no qualification can be annexed.

It is idle to say that the mortgagor might have gone on for five years without paying interest. The mortgagee has always his remedy by action for the interest.

The original contract of April, 1868, was never superseded. *Twyford* admits that *Simpson* stood in his stead.

The mortgage is in the name of *Simpson*. How, then, could equitable pleas have been pleaded? Can a Court of Law qualify the terms of a deed?

A Defendant at law, having a good equitable defence, as well as a good legal defence, is not bound to go into evidence at law, but may submit to judgment at law, and afterwards file a bill: *Billage* v. *Southee* (4).

Even if he had pleaded equitable pleas, he would not have been precluded from suing here: *Waterlow* v. *Bacon* (5).

Sir James Bacon, V.C.:—

I regret very much that there is a conflict of evidence as to certain facts in this case. The time will or may come when that difference may be decided upon, but at present I not only have not sufficient means to decide it, but it is not at all necessary, in my view of the case, that I should decide it.

This much is agreed between the parties, that upon the treaty for the purchase, the written agreement, which is stated in the

(1) 8 Ir. Eq. Rep. 482; S. C., 2 J. & Lat. 521.

(2) 25 L. J. (Ch.) 284.

(3) 3 Deac. 151; S. C., 3 M. & A. 477.

(4) 9 Hare, 534.

(5) Law Rep. 2 Eq. 514.

V.-C. B. 1870 SEATON v. TWYFORD.

first paragraph of the bill, was come to between the Plaintiff and Mr. *Twyford*, by which Mr. *Twyford* agreed to advance £400 by way of mortgage at £5 per cent., and that the sum should not be called in for the next five years.

An action has been brought, declaration delivered, plea pleaded, and judgment recovered. Under these circumstances this bill is filed, which asks, in the first instance, an injunction to prevent the execution of that judgment, and also to prevent the Plaintiff from exercising his power of sale; and then, that the Defendant may be decreed to carry into execution and perform the agreement of April, 1868; that is to say, it is a bill for the specific performance of the agreement mentioned in the first paragraph of the bill.

Now, assuming, for the purposes of the present discussion, that the suit can be sustained for that purpose, and that the Plaintiff is entitled to have specific performance of that agreement, the decree would of necessity declare his right in that respect, and if the parties did not agree, refer it to the proper place to settle the terms of a mortgage deed. But it is not, in my opinion, open to question that, if the case were taken into Chambers for the purpose of preparing a mortgage deed under such a decree as I have mentioned, the mortgage would not be in the most ordinary form, giving five years to pay the mortgage-money, but making it a condition of that postponement that the interest in the meantime should be paid. The failure to pay the interest would, in a mortgage prepared in the most ordinary form, release the mortgagee from the necessity of waiting five years before he exercised such powers as a mortgagee possesses. It is difficult to conceive a mortgage that could be framed in any other way. That that is the true principle, the cases which have been referred to prove beyond all doubt, if it were in question; but, in my opinion, it is open to no question. The mortgagor who stipulates that he shall have five years to pay the mortgage-money, must of necessity, whether it is expressed or not, undertake at the same time that, if he fails to do that which is incumbent upon him during the period of five years to do, the restriction upon the mortgagee shall thereupon cease. The cases before Vice-Chancellor *Kindersley*, and before Lord *St. Leonard's* in *Ireland*, and the case in the Court of Review, which is not less strong than the other two, recognise and

adopt that principle as the clear rule of law. In bankruptcy the assignees would have very good reason to say, and it might be to their interest to say, that there was a stipulation that the mortgage debt should not be paid off for five years; and it might be disadvantageous to the bankrupt's estate that a sale should take place earlier than five years. There might be a variety of circumstances which would perfectly justify that contention, in reason, and in the interest of the creditors. But the decision of the Court of Review is very plain, that, default having been made, there was a right to foreclose (for a sale in bankruptcy is exactly similar to a foreclosure, or to a decree for sale in a foreclosure suit), and it was held there, and, I think, properly held, that the assignees could offer no effectual objection to the claim of the mortgagee to have a present realisation of his security.

If that is so upon general principles, how much stronger the principle becomes when applied to this individual case. Here is a small leasehold house, held for not a long term, burdened with a large ground-rent, and further burdened with the payment of the interest upon the mortgage debt. It is to the mortgagee's interest, for the very preservation of his security, that the ground-rent should be paid. It is his right that he should receive the stipulated amount of interest upon his mortgage-money. Upon that footing he enters into this transaction, and the argument at the Bar seems to assume that, because the written agreement stipulates for five years as the period of the forbearance of the mortgagee to call in the principal, therefore he is to be at the mercy of the mortgagor all that time, who may forfeit the lease, and who may expose the persons preceding the mortgagee in title—I mean the original lessee, and Mr. *Twyford*, who is an assignee from him—to the chance of being called upon for the payment of the ground-rent. Such a stipulation as I have suggested would, of necessity, in my opinion, be inserted in a mortgage deed, if the Court had made a decree for the specific performance of that agreement.

Then what are the facts not in dispute? That at a very early period after this transaction the mortgagor is wholly in default; he does not pay the ground-rent; an action is brought against him for the interest; the landlord threatens to proceed, not against

V.-C. B. 1870 SEATON v. TWYFORD.

him, but against the persons who precede him in title; and at length he does pay the ground landlord, and he does offer, in a fashion, but not at all a satisfactory one, to pay the interest (I refer particularly to Mr. *Smith's* letter). Can it be said that, supposing the agreement was clearer and more distinct than it is—supposing that specific performance of it were decreed and ordered actually to be carried into effect—there is any reason why, after what has taken place in this matter, there should now be any restraint upon the mortgagee?

I have said in the course of the discussion that I was not convinced that an equitable plea might not have been pleaded to the action brought by the mortgagee. I remain unconvinced upon that subject, although I admit that there is great weight in what Mr. *Willcock* has said; and that the difficulties which a Court of Law might be under, in making an effectual and complete decision between the parties, might preclude the success of such a plea. But every one of those considerations only shews more forcibly that, the Plaintiff's case being such as it was, it was incumbent upon him to have come to this Court at an earlier period. Between the 12th of March and the beginning of December, when the suit was instituted, he had abundant opportunity of bringing his case before the Court. He suffers the proceedings at law to go on; he makes no effort to plead an equitable plea, so that the question whether it would succeed or not cannot now be properly considered; he waits until a judgment is obtained against him, and then he applies to this Court, and upon the equitable grounds suggested in his bill he desires this Court to deprive the mortgagee of the fruits of that judgment which he has obtained. In my opinion the Plaintiff comes, upon that ground, very late; I do not say positively too late; but upon the other ground which I have mentioned, namely, that, if he had had a mortgage deed prepared according to the full extent of every right that he could lawfully assert under the terms of that agreement, yet, being in default for non-payment of the interest, he would not be entitled to restrain the mortgagee from exercising the powers which a mortgage deed properly constituted would have conferred upon him, and which, upon this hearing, it must be implied are contained in the terms of the agreement.

I am of opinion, therefore, that I cannot grant any injunction, except upon the terms of the Plaintiff paying into Court the whole of the money which has been recovered in the action at law.

[After some discussion the order made was, that the motion be refused, unless the Plaintiff should bring the money into Court within a week. The costs, including the costs in the action, were ordered to be costs in the cause.]

Solicitor for the Plaintiff: Mr. *C. P. Pritchard.*

Solicitors for the Defendant: Messrs. *Walker, Twyford, & Belward.*

ASTON *v.* MEREDITH.

Practice—Partition—Sale—31 & 32 *Vict. c.* 40, *s.* 4.

A sale may be decreed under the *Partition Act*, 1868, although the bill contains no prayer for partition.

13 Eq 406-7

CHARLES MEREDITH, by his will, dated the 7th of June, 1841, devised real estate to the use of *John Liptrott Greaves* and *Joseph Brown*, upon trust, after decease and failure of children of his daughter *Frances Meredith*, for all and every his nephews and nieces, children of his sister *Louisa Ann Twamley*, and his brothers *John*, *Henry*, and *George*, who should be living at the decease of his daughter, and who should attain twenty-one or marry, as tenants in common; and also the issue then living, who should attain twenty-one or marry, of any of his said nephews or nieces who might have died in the lifetime of his daughter, such issue to take *per stirpes* as tenants in common. He appointed the above-named trustees his executors.

The testator died on the 14th of June, 1843. The executors renounced probate, and never accepted or acted in the trusts; and the testator's brother and heir-at-law, *John Meredith*, conveyed the freeholds to the use of himself and the Plaintiff *John Aston.*

Testator's daughter *Frances* died in 1868, without having had issue.

Louisa Ann Twamley died in 1840, having had one child, *Louisa Ann*, wife of *Charles Meredith.*

SC on another pt (as to distribution of the funds)
13 Eq 492

V.-C. B. 1871 ASTON v. MEREDITH.

John Meredith died in 1850, having had one child, the Plaintiff, *Lucy Louisa Ann*, wife of the Plaintiff *John Aston*.

Henry Meredith died on the 21st of May, 1841, having had two children, one of whom died in December, 1819, an infant. The other was the Defendant *Henry Meredith*.

George Meredith died in 1856, having had eleven children, namely, *George*, who died in the year 1836, never having been married; *Sarah Poynter*, widow; *Louisa Bell*, widow; *Sabina Boyes*, widow; *Charles*; *John*; *Maria*, wife of *Joseph Henry Kay*; *Edwin*; *Clara Dry*, widow; *Fanny*, wife of *Francis Seymour Gaynor*; and *Rosina Despard*, who died before 1868, leaving one child, *Frederica Mary*, now an infant.

The bill was filed in April, 1869, stating the above facts, and that Mr. and Mrs. *Charles Meredith*, Mrs. *Boyes*, *Charles* and *John Meredith*, Mrs. *Kay*, *Edwin Meredith*, Mrs. *Dry*, and Miss *Despard* were out of the jurisdiction; and alleging as follows:—

"Having regard to the nature of the property, and the number of the parties interested therein, and to the absence abroad or disability of some of the parties, it will be much more beneficial to the parties interested that each property should be sold, and the proceeds of such sale distributed amongst such parties according to their rights and interests, than that such property should be partitioned amongst them."

The bill then prayed for a sale, without any prayer for a partition.

On the 11th of June, 1869, a decree was made, upon motion for decree, directing inquiries as to the parties interested.

On the 1st of October, 1869, Mrs. *Poynter* died, having devised her interest in the real estate unto and to the use of *James Goodall Francis*, *Elizabeth Sabina Poynter*, *Charles Meredith Poynter*, and *George Farbrace Poynter*, and their heirs, upon trusts for sale, for the benefit of the three last-named persons. She appointed the same four persons executors. They also were out of the jurisdiction.

Notice of the motion for decree had been served on all of the above persons who were adults, except *J. G. Francis*, and on the guardian of the infant.

The cause now came on upon further consideration.

Mr. *L. Field*, for the Plaintiffs:—

We ask for a sale: *Silver* v. *Udall* (1). All the parties have been served, in accordance with *Hurry* v. *Hurry* (2), except *J. G. Francis*, who is a bare trustee of a power.

It should be stated, however, that Lord *Romilly*, in a case of *Tvall* v. *Watts* (3), seems to have thought it right that a bill seeking a sale under the *Partition Act* should contain a prayer for partition.

Mr. *Dunn*, for the Defendants, supported the application, which was not opposed.

SIR JAMES BACON, V.C., decreed a sale of the property in the usual form; the money to be paid into Court, subject to further order.

Solicitors: Messrs. *Field, Roscoe, Field, & Francis*, agents for Messrs. *Stone, Paget, & Billson, Leicester.*

(1) Law Rep. 9 Eq. 227. (2) Law Rep. 10 Eq. 346.
(3) Law Rep. 11 Eq. 213.

C. J. B.
1871
Feb. 20;
March 6.

Ex parte DUIGNAN and Others.
In re BISSELL BROTHERS.

Bankruptcy Act, 1869, *s.* 95, *sub-s.* 3; *s.* 125—*Liquidation by Arrangement—Execution—Seizure and Sale—Act of Bankruptcy—Relation back.*

The filing of a Petition for liquidation by arrangement is an act of bankruptcy "available for adjudication" within the meaning of the 95th section, sub-sect. 3; and the title of the trustee appointed in the liquidation relates back in the same manner as the title of a trustee under a bankruptcy.

Therefore, where a Petition for liquidation by arrangement had been filed by a debtor before seizure of his goods under an execution, and notice of the filing was given to the solicitors of the execution creditor before sale, and the goods were afterwards sold by the sheriff to the solicitors, who were restrained by injunction from removing them:—

Held, that the goods must be delivered up to the trustee who had been appointed in the liquidation.

Port 617
12 Eq 209
16 Eq 627
9 C.B. 223.
9 Ch. 612
Affd 1 Ch App 6 Ch 605

THIS was an appeal from an order of the Judge of the County Court of *Warwickshire*, held at *Birmingham*, whereby the Appellants, Messrs. *Duignan, Lewis, & Lewis*, were ordered to deliver up, to the trustee appointed under a Petition for liquidation by arrangement, certain household goods and furniture, the property of one of the petitioning debtors, and also to pay the costs of the proceedings in the Court below.

The facts were as follows: *Bissell Brothers* were coal merchants, carrying on business in partnership in *Birmingham*, and were indebted to Messrs. *Owen & Co.*, colliery proprietors, for goods supplied by the latter. Before the 4th of November, 1870, Messrs. *Owen & Co.* brought an action for their debt. On the 4th of November, 1870, the debtors signed a Petition for liquidation by arrangement under the *Bankruptcy Act* of 1869, in Form 106, and on the same day their attorney wrote and sent the following letter to the Appellants, who were the attorneys of Messrs. *Owen & Co.*:—

"8, *Ann Street, Birmingham,*
"Nov. 4, 1870.

"*Bissell and Another* v. *Owen and Others.*

"Dear Sirs,—These Defendants have consulted us in reference to their affairs, and under my advice they have signed their

Petition for liquidation by arrangement, and I shall file same to-morrow morning. I give you this notice to save your clients any further expense in going on with their action.

"Yours faithfully,

"*Joseph Rowlands.*

"Messrs. *Duignan, Lewis, & Lewis.*"

Messrs. *Duignan & Co.* made no reply to this letter, and on the 7th of November signed judgment in the action for £47 13*s.* 6*d.*, the amount of the debt and costs, and obtained a warrant of execution, under which, on the 8th of November, the sheriff's officer took possession of the goods in question. On the same day *Heath*, a clerk of the Appellants, applied to the sheriff's officer to sell to the Appellants, for their own use, so much of the goods seized as would realise the amount of the execution debt. A valuation and inventory was accordingly taken by an auctioneer, and certain of the goods were by him appropriated to the Appellants at the price of £47 13*s.* 6*d.*, and *Heath* assented to the appropriation, and in order to pay the purchase-money produced a cheque, which had been drawn by his employers in favour of the sheriff's officer, the amount having been left blank. Before the cheque was filled up, a question was raised whether any rent was due to the landlord of the premises upon which the execution had been levied, and the auctioneer's clerk left the room to make inquiries on this point, it being previously arranged that, in the event of any rent being due, the Appellants should buy so much more of the goods as, at the price at which they had been valued, would make up the amount of such rent. While the auctioneer's clerk was absent from the room for the above purpose, *Thomas F. Bissell* arrived, and served upon *Heath* an order, which had on that day been obtained from the County Court Judge, ordering the execution creditors to withdraw from possession. *Bissell* was informed that the order came too late, as the sale had already taken place, and shortly afterwards the auctioneer's clerk returned, having ascertained that no rent was due. Upon this *Heath*, notwithstanding the opposition to his so doing which was offered by *Bissell*, filled up the cheque to the amount of £47 13*s.* 6*d.*, and handed it to the auctioneer's clerk, and obtained his receipt for it. The goods were not removed, and in obedience to the injunction the sheriff's officer withdrew, but, at

C. J. B. 1871 *Ex parte* Duignan. *In re* Bissell Brothers.

the request of *Heath*, left two of his men in possession as bailiffs for the Appellants.

On the 11th of November an order was made restraining the Appellants from removing the goods. On the 25th of November the first meeting of creditors was held, and a resolution for liquidation by arrangement under the 125th section was passed, and a trustee appointed. On the 29th of November the order appealed against was made.

The following admission, signed by the attorneys on both sides, was in evidence:—

"*Re Bissell Brothers.*

"23rd Nov., 1870.

"It is admitted that Mr. *Badham*, the sheriff's officer, informed the clerk to Messrs. *Duignan, Lewis, & Lewis*, who was sent over by them to purchase the goods in question, that he was informed that the above-named debtors had filed their Petition. This statement was made by Mr. *Badham* after seizing, but before the alleged sale."

Mr. *De Gex*, Q.C., and Mr. *Everitt*, for the Appellants:—

Where seizure has been made before any act of bankruptcy by the debtor, an execution is good against the trustee, and does not require protection: *Edwards* v. *Scarsbrook* (1); *Ex parte Todhunter* (2).

Here there has been no act of bankruptcy. Filing a Petition for liquidation by arrangement, at all events when the liquidation proceeds, is not an act of bankruptcy: *Monk* v. *Sharp* (3); *Ex parte Harrison* (4). The case of *In re Jones*, before your Honour on the 25th of February, 1870, did not decide the point. The Petition in that case was ordered to be amended so as to shew that the liquidation was not proceeded with, but that a bankruptcy was resolved upon. The Petition is not made an act of bankruptcy by any express provisions of the statute; and although a Petition in Form 106 contains a statement by the debtor of his inability to pay his debts, that does not constitute an act of bankruptcy within the meaning of sect. 6, sub-sect. 4, of the Act of 1869, being filed *alio intuitu*, and not "in the prescribed manner." Sect. 184 of the Bankruptcy Act of 1849 is not repeated in the new Act, and in the

(1) 3 B. & S. 280. 9 Jur. N.S. 537
(2) Law Rep. 10 Eq. 425.
(3) 2 H. & N. 540.
(4) 26 L. J. (Bkcy.) 30. 3 Jur. 228.

absence of express enactment to the contrary, the execution would be good even if there had been no valid sale: *Morland* v. *Pellatt* (1); *Parsons* v. *Lloyd* (2); *Edwards* v. *Scarsbrook* (3). If the 184th section of the Act of 1849 were still in force, it would not affect us, because the execution was completed by seizure and sale before the appointment of the trustee, which is equivalent to the filing of a Petition for adjudication in bankruptcy. The order of the 8th of November was too late. If the filing of a Petition for liquidation by arrangement is an act of bankruptcy, and we need the protection of the 95th section, sub-sect. 3, we are entitled to it, because the filing of the Petition cannot be said to be an act of bankruptcy "available for adjudication" within the meaning of the 95th section (4); the express object of the Petition being to avoid bankruptcy, which, if the liquidation proceeds, cannot ensue, and the appointment of the trustee, and not the filing of the Petition, being, by sect. 125, sub-sect. 7, made equivalent to the presentation of a Petition for, or the order of adjudication in bankruptcy, and the execution in this case was completed by seizure and sale before the appointment of the trustee. And, moreover, the letter of the 4th of November, informing us that the Petition had been signed, was no notice of the filing: *Conway* v. *Nall* (5); and we had no sufficient notice before seizure and sale.

The argument on the other side must be that the liquidation in all cases commences with the Petition, which is contrary to the 125th section of the Act, sub-sect. 4, which expressly provides that "the liquidation by arrangement shall be deemed to have commenced as from the date of the appointment of the trustee."

(1) 8 B. & C. 722.

(2) Law Rep. 1 Ex. 307, n.

(3) 3 B. & S. 280.

(4) Sect. 95 and sub-sect. 3 are as follows: "Subject and without prejudice to the provisions of this Act, relating to the proceeds of the sale and seizure of the goods of a trader, and to the provisions of this Act avoiding certain settlements, and avoiding, on the ground of their constituting fraudulent preferences, certain conveyances, charges, payments, and judicial proceedings, the following transactions by and in relation to the property of a bankrupt, shall be valid notwithstanding any prior act of bankruptcy."

"Sub-sect. 3. Any execution or attachment against the goods of any bankrupt executed in good faith by seizure and sale before the date of the order of adjudication, if the person on whose account such execution or attachment was issued had not at the time of the same being executed, by seizure and sale, notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication."

(5) 1 C. B. 643.

C. J. B.
1871
Ex parte DUIGNAN. *In re* BISSELL BROTHERS.

Mr. *Reed*, for the trustee:—

Edwards v. *Scarsbrook* (1) is inconsistent with *Ex parte Veness* (2) and *Ex parte Todhunter* (3), and only decided that, in order to bring a case within the protection clause, the notice referred to in that clause must be notice of an act of bankruptcy committed before seizure.

The filing a Petition for liquidation has been decided by your Honour to be an act of bankruptcy: *In re Jones*; and it is clearly so by the express provision of the Act of 1869, sect. 6, sub-sect. 4, when it is in Form 106, and contains a declaration of insolvency. The title of the trustee in a liquidation relates back to the filing of the Petition: *Ex parte Todhunter*. If the contention on the other side could be supported, if a debtor file a Petition to-day and fix a meeting of creditors some weeks hence, any creditor for less than £50 may put in an execution in the interval.

The Petition was filed before seizure, and the Appellants had full notice of it. If the letter of the 4th of November was not sufficient, the admitted notice to their clerk on the 8th of November, before the alleged sale, certainly was: *Pike* v. *Stephens* (4); *Spratt* v. *Hobhouse* (5); *Ramsey* v. *Eaton* (6); *Hope* v. *Meek* (7); *Udal* v. *Walton* (8); *Bird* v. *Bass* (9); and therefore the execution will not be protected.

Mr. *De Gex*, in reply.

March 6. SIR JAMES BACON, C.J., after stating the facts and dates, continued:—

In support of the appeal it has been argued that the filing of a Petition by a debtor is not an act of bankruptcy, that it is not declared to be so by any express terms in the statute, and that the object and purpose of the Petition is to avoid bankruptcy; since, if the liquidation by arrangement proceeds, bankruptcy cannot ensue, and that for this reason the filing the Petition ought not

(1) 3 B. & S. 280.
(2) Law Rep. 10 Eq. 419.
(3) Ibid. 425.
(4) 17 L. J. (Q.B.) 282.
(5) 4 Bing. 173.
(6) 10 M. & W. 22.
(7) 25 L. J. (Ex.) 11.
(8) 14 M. & W. 254.
(9) 6 Man. & G. 143.

to be held to be an act of bankruptcy available for adjudication, because in that case no adjudication can ever take place.

Besides this, it was insisted that, even if the filing the Petition was an act of bankruptcy, the Appellants had no notice of it, for that the letter of the 4th of November only announced an intention of filing the Petition; and it was contended that, before notice reached the Appellants that the Petition had been filed, the execution was completed by seizure and sale, and was therefore protected by the very terms of the 95th section.

Now, in considering the question thus raised, it becomes necessary to have regard to the statute now in force, and to the rules which have been made for carrying it into effect; which rules are declared, by the 78th section, to be within the powers conferred by the Act, and to be of the same force as if they were enacted by the body of the Act.

The law in bankruptcy has been from its origin the creature of legislative enactment, and it still is of that character, although there is now but one statute by which the law is declared. By the *Bankruptcy Act*, 1869, and the Repealing Statute, cap. 83, all the pre-existing statutes were repealed, and a new law of bankruptcy was established. I say a new law, because, although many of the principles of the former law are incorporated in the present statute, a principle wholly new was at the same time introduced, and its most prominent features, as well in the enactments as in the provisions, which are embodied in it by means of the rules, are to hand over to the creditors of insolvents, generally, an absolute power of determining the manner in which and the terms upon which the assets of a debtor who is found to be bankrupt, whether in consequence of a hostile proceeding originated by his creditors, or by his own confession, shall be administered and distributed.

In construing and carrying into practical execution the provisions of the existing law, the principle I have adverted to is to be kept in view, as the only safe guide. The object of the statute is in this respect single, namely, the securing and administering for the benefit of all the creditors all the property of which, when the proceedings authorized by the statute commence, the debtor is possessed. The provisions of the statute are various, but each and all of them are governed by the principle I have men-

C. J. B. 1871 *Ex parte* DUIGNAN. *In re* BISSELL BROTHERS.

tioned. Thus, in the earlier clauses of the statute, the subject of bankruptcy, pure and simple, is alone spoken of in terms, with very ample powers over the realisation and distribution of the debtor's property; but other parts of the statute, especially the 125th and 126th sections, enable the creditors to decide whether the distribution shall be made upon terms to which a majority of creditors shall agree, with or without actual bankruptcy, or by means of a composition. Nevertheless, in each of the cases, except the last, the plain purport and effect of the statute is to transfer the whole property of the debtor to the creditors, for the purpose of equal distribution among them, and to leave in the debtor neither right nor power in or over that which, before his inability to pay his debts was declared, was his. Although it was thought proper to enact the law relating to simple bankruptcy in separate clauses, yet the provisions as to liquidation by arrangement are, by reference and by implication strong and clear, so united with those clauses as to make one entire, complete, and harmonious law upon the subjects which the statute comprehends.

To read the statute in any other sense would, in my judgment, lead to mere confusion, would perpetuate the manifold evils which have been found to arise from the decisions which have been pronounced upon various clauses of the former statutes, not always reconcileable with each other, still less with what was obviously the intention of the Legislature—an intention sometimes disappointed by the construction put upon the words in which it was expressed. It was (as I think cannot be questioned) to avoid the recurrence of these evils, as well as to accomplish the new object of the Legislature, that all the former statutes in bankruptcy were repealed, and the present Act was adopted, as containing the whole and entire statutory law in bankruptcy, including in that word the several modes by which the property of an insolvent debtor is to be dealt with by his creditors for their common benefit.

With this view, and for this purpose, the 12th section of the Act provides that no creditor who has a debt proveable in bankruptcy shall have any remedy against the property or person of the bankrupt in respect of such debt, except in the manner directed by the Act. The Court may, at any time after the presentation of a bankrupt petition, restrain further proceedings in any action, suit, execution, or other legal process against the debtor in respect of

C. J. B.
1871
Ex parte DUIGNAN.
In re BISSELL BROTHERS.

any debt proveable in bankruptcy, and may appoint a receiver. The property of a bankrupt divisible among his creditors is defined to be (sect. 15, sub-sect. 3) "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy." By sect. 11, the doctrine of relation, which has given rise formerly to much doubt, and to litigation which was not always satisfactory in its results, nor consistent with the pervading principle of the law in bankruptcy, is put upon a plain and intelligible footing, and is to commence at the time of the act of bankruptcy being completed on which the order is made adjudging the debtor to be bankrupt. And by the 92nd section, for the first time, fraudulent preferences are made the subject of express enactment. The 95th section, to which frequent reference has been made during the discussion, enacts:—[His Lordship here read the 95th section and its 3rd sub-section.]

The subject of bankruptcy simple being dealt with by the first five divisions of the statute, the 6th part deals with liquidation by arrangement, and the 5th sub-section of sect. 125 provides:—[His Lordship read sub-sects. 5, 7, 11, and 12 of the 125th section.]

The modifications mentioned in sub-sect. 7 are particularly expressed in sub-sect. 9, and relate to the audit of accounts, the close of the liquidation, the discharge of the debtor, and the release of the trustee—over which subjects the creditors have absolute power; but with these exceptions (which have no relation to the present case), as I read and understand the Act, the several statutory provisions I have before mentioned apply in their full force to liquidation by arrangement, in like manner, and to the same extent, as they do to cases of plain bankruptcy; and this view appears to me to be fully confirmed by the rules which have been made on this subject, and which are of the same force as positive enactments. Thus, Rule 252 directs, that the proceedings shall be instituted by the debtor by petition and affidavit in the Form 106 in the schedule, whereby the debtor petitioning for liquidation by arrangement alleges "that he is unable to pay his debts." By the form of the declaration, which by sect. 6, sub-sect. 4, is declared to be an act of bankruptcy, in like manner the debtor says, "I admit I am unable to pay my debts;" and seeing that power is given to the Court to adjudge a petitioning debtor bankrupt for any sufficient cause, I hold it to be unquestionable, that from the moment at which a debtor files a Petition in

C. J. B. 1871 *Ex parte* DUIGNAN. *In re* BISSELL BROTHERS.

the Form 106, he has done an act which, in the words of the 95th section, is available against him for adjudication, and by which act alone the Court can find the foundation for an order adjudging him bankrupt. The Court must be the same as that to which a Bankruptcy Petition would be presented (Rule 253). The like power is given to the Court, at any time after the presentation of a Petition, to grant injunctions against actions or executions, or to appoint a receiver, as in Bankruptcy (Rule 260). The Court may adjudicate the Petitioner bankrupt either with a stay of proceedings or absolutely (Rules 266, 267). Debts which would be proveable in bankruptcy at the institution of the proceedings may be proved, and proofs are to be made in like manner in every respect as in bankruptcy (Rules 271, 272). Every creditor in respect of a proveable debt shall, in the event of a liquidation being resolved upon, be restrained from commencing, continuing, or enforcing any proceedings whatsoever against the debtor or his property, unless the Court shall be of opinion that the estate would yield a larger dividend if administered in bankruptcy (Rule 289), and provision is made for the occurrence of bankruptcy during the continuance of a liquidation by arrangement (Rule 290). In these and all the other regulations which are established, the possibility of actual bankruptcy being adopted instead of liquidation by arrangement is kept in view, and yet the power of adjudication as bankrupt exists only by means of the petition in the form prescribed, containing an admission of the debtor's insolvency. The conclusion therefore seems to me to be irresistible that the filing of the Petition is an act of bankruptcy. And this mode of considering and construing the statute brings all its provisions into congruity and harmony, while to read it otherwise would be to lose sight of the true object of the Legislature, and to disperse and confuse provisions which are meant to form an entire concordance. The statute directs that the debtor's property shall be distributed as in bankruptcy, and although that property does not vest in the trustee until his appointment, the trustee's title, when appointed, relates back to the act by which the debtor may be adjudicated bankrupt, and all interim proceedings which would be void against a trustee in bankruptcy are equally void against a trustee in liquidation. To decide otherwise would be to leave the estate distributable at the mercy of the debtor, who might be inclined, even after his petition had been filed, to favour certain

of his creditors, and of creditors who by their diligence or ingenuity might secure a preference which it is the purpose of the law to discountenance and prevent; and although by injunction, and the appointment of a receiver, these consequences might be prevented, yet in all those cases in which the debtor does not care to invoke the power of the Court in this respect, and where creditors are not aware of the impending danger, the estate which is the common property of all might fall to the share of a few or only one of the creditors.

Then was notice of that filing of the Petition, which I hold to be an act of bankruptcy, conveyed to the execution creditors or to their solicitors, Messrs. *Duignan & Lewis*, who say they constituted themselves purchasers of part of the debtor's estate? The first intimation given to them was by the letter of the 4th of November, which apprises them, not generally that an act of bankruptcy had been committed, but that a Petition had been signed by the debtor which might be filed by any creditor, and which when filed would constitute an act available for adjudication, and that it was intended to file that Petition on the morrow. If it had stopped there it might not have been—I do not say that it would not have been—sufficient; but at least it was sufficient to put them upon inquiry. It seems, however, to have had a directly contrary effect; I must take it that they did not inquire, and I think I ought to assume that they purposely abstained from inquiring, whether a Petition had been filed.

They issued their execution probably as soon as the writ could be procured, and on the 8th of November they sent a clerk, their appointed agent in the matter, with full power to buy of the sheriff and to pay him with a cheque, blank when it was signed by them, but which their agent was authorised to fill up. What then took place I have stated from the evidence and the admission, and upon the facts I take it to be quite clear, that whether the notice of the 4th of November was sufficient or not, they had, through Mr. *Heath*, their duly constituted agent in the matter referred to, on the 8th of November, and before their execution was executed by seizure and sale, sufficient and full notice that a Petition for liquidation had been filed by the debtor before the execution was issued, and therefore that an act had been done by him which was available for adjudication in bankruptcy against him. If adjudication had

C. J. B. 1871 *Ex parte* DUIGNAN. *In re* BISSELL BROTHERS.

ensued, as it might have done, the title of the trustee would have had relation to the time at which the Petition was filed, that being the only act upon which the adjudication could have been founded. That no adjudication was in fact pronounced can make no difference, unless the provision which the Legislature has made for the equal distribution of a debtor's estate among his creditors, having proveable debts, shall be disregarded, and unless it shall be held that some creditors may acquire rights in preference to the others by any proceeding which can be taken after the completion of the act of bankruptcy.

It is not necessary to inquire into the degree of "good faith" in which the execution in question was levied, after the letter of the 4th of November, although, if that were the only or the principal point in the case, I am not inclined to think that I should consider it unimportant. What I place my judgment upon is this—that the filing of the Petition for liquidation on the 5th of November was an act of bankruptcy available for adjudication, and that the execution was not executed by seizure and sale until after Messrs. *Duignan & Lewis*, who say they purchased the debtor's goods of the sheriff, had notice of such act of bankruptcy, and that the very goods which they purported to buy were by law distributable among the creditors. I am of opinion, therefore, that the order appealed against was right, and that the appeal should be dismissed with costs.

Several cases have been cited in the argument, which were decided under the statutes formerly in force. To those cases I have not thought it necessary to refer particularly—not, as I would have it observed, because I am not fully sensible of the respect which is due to those decisions, but because they are all founded upon the express enactments of the statutes now repealed, which were different in their spirit, and in some respects in their terms, from that which now constitutes the law in bankruptcy, and because I have felt it to be my duty to decide the case before me solely upon the provisions of the statute of 1869.

Solicitor for the Appellants: Mr. *C. G. Rushworth*, agent for Messrs. *Duignan & Co., Birmingham.*

Solicitor for the Respondent: Mr. *J. M. Green*, agent for Mr. *J. Rowlands, Birmingham.*

Ex parte BIRMINGHAM AND STAFFORDSHIRE GAS LIGHT COMPANY.
In re FANSHAW & YORSTON.

C. J. B.
1871
March 28.

Bankruptcy Act, 1869, *ss.* 13 (1), 34 (2)—*Gen. Rules of Jan.*, 1870, *Rule* 260 (3) —*Distress for Rent*—"*Execution or other legal Process.*"

Distress for rent is not "an execution or legal process" within the meaning of those terms in sect. 13 of the *Bankruptcy Act* of 1869, and Rule 260 of the Gen. Rules of Jan., 1870; therefore where a gas company who, by an express section in their special Act, were authorized to recover rent and charges due to them for gas "by the same means as landlords may recover rent in arrear," after notice of the filing of a petition for liquidation by arrangement, distrained upon the goods of the petitioning debtors for a sum due for gas supplied, and the County Court Judge granted an injunction under the *Bankruptcy Act*, 1869, restraining further proceedings in the distress:—

Held, that the injunction had been improperly granted, and that the distress was good against the trustee under the liquidation.

THE appeal in this case was from an order of the Judge of the County Court of *Worcestershire*, held at *Dudley*, by which the

(1) Sect. 13 provides that "The Court may at any time after the presentation of a bankruptcy petition against the debtor restrain further proceedings in any action, suit, execution, or other legal process against the debtor in respect of any debt provable in bankruptcy, or it may allow such proceedings, whether in progress at the commencement of the bankruptcy, or commenced during its continuance, to proceed upon such terms as the Court may think just."

(2) Section 34 is as follows: "The landlord or other person to whom any rent is due from the bankrupt may, at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy, it shall be available only for one year's rent, accrued due prior to the date of the order of adjudication; but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the overplus due for which the distress may not have been available."

(3) Rule 260 contains the following: "The Court may, at any time after the presentation of a petition, restrain further proceedings in any action, suit, execution, bankruptcy petition, or other legal process against the debtor or his estate, in respect of any debt proveable; or it may allow such proceedings, whether in progress at the filing of the petition, or subsequently commenced, to proceed upon such terms as the Court may think just."

C. J. B. 1871

Ex parte BIRMINGHAM AND STAFFORDSHIRE GAS LIGHT COMPANY. *In re* FANSHAW AND YORSTON.

Appellant company were restrained from taking further proceedings in a distress which had been levied by them upon the joint property of Messrs. *Fanshaw & Norton.*

The *Birmingham and Staffordshire Gas Light Company* was incorporated by Act of Parliament, and by their principal Act (8 & 9 Vict. c. 66, s. 155) it is provided, that if any person supplied with gas by the company shall neglect to pay any rent or charge due to the company for the same, "the company may recover the rent or charge due from such person, if less than £20, together with the expenses (if any) that shall have been incurred in cutting off the gas, and costs of recovering the same, by the same means as landlords are by law empowered to recover rent in arrear, or if the rent or charge so due shall amount to £20 or upwards it shall be lawful for the company to recover the same (together with the expenses of cutting off the gas), either in manner aforesaid, or by action of debt or on the case in any of the Superior Courts." The 158th and 159th sections of the Act expressly authorize the company to levy by distress penalties imposed by the Act for wilful and accidental damage to their property.

The 187th section enacts, that "where in this Act any sum of money, whether in the nature of penalty or otherwise, is directed to be levied by distress, such sum of money shall be levied by distress and sale of the goods and chattels of the person liable to pay the same."

Fanshaw & Norton, who carried on business as ironmasters, in partnership, in *Staffordshire,* were indebted to the company for gas supplied, and on the 13th of December, 1870, filed a petition for liquidation by arrangement. On the same day notice of the filing of the petition was served upon the company. On the 15th of December the company, under the 155th section of their principal Act, issued warrants authorizing their bailiffs to distrain on the goods of the petitioning debtors for the sum of £16 17*s.* 9*d.*, the amount of the debt due to the company; and on the same day goods of the debtors of sufficient value to cover the debt and expenses were seized. On the 17th day of December a receiver was appointed, and an interim order restraining the company from taking further proceedings upon the distress warrants was obtained and served upon the company. On the 17th of January,

C. J. B. 1871 *Ex parte* BIRMINGHAM AND STAFFORDSHIRE GAS LIGHT COMPANY. *In re* FANSHAW AND YORSTON.

1871, the creditors having resolved upon a liquidation by arrangement, the receiver was appointed trustee; and on the 19th of January, 1871, the Court, after hearing both parties, made the injunction perpetual. Against this order the company appealed.

Mr. *De Gex*, Q.C., and Mr. *Bardswell*, for the Appellants:—

Your Lordship has recently decided, in the case of *In re Bissell* (1), that the filing a petition for liquidation by arrangement is an act of bankruptcy, therefore we do not argue that point; but admitting the petition to be an act of bankruptcy, this distress is good against the trustee, because, under the express terms of sect. 155 of their Act, the company, for the purpose of obtaining payment of rent or charges due to them for gas, may exercise all the rights which a landlord has for the recovery of rent; and under the 34th section of the *Bankruptcy Act*, 1869 (subject to the limitation therein contained), a landlord may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods of the bankrupt for the rent due from him.

The Court below had no jurisdiction to make the order appealed against. The injunction was granted under sect. 13 of the *Bankruptcy Act*, 1869, or under Rule 260 of the Gen. Rules of Jan., 1870, but a distress is not an "execution or legal process:" *Kerr's Blackstone* (2); *Blackamore's Case* (3); *Rex* v. *Crisp* (4). It was never considered to be included in the terms "execution, sequestration, or process," used in the 198th section of the *Bankruptcy Act*, 1861: *Williams* v. *Cadbury* (5).

The CHIEF JUDGE inquired during what period the gas in respect of which the debt was due had been supplied, and being informed by the Respondents' counsel that there was no evidence on the point, said it must be presumed that the debt accrued within the time limited by the 34th section of the Act of 1869 in cases in which distress is levied after the commencement of the bankruptcy.

Mr. *Bagley*, for the trustee:—

Sect. 155 of the gas company's Act gives them the same

(1) *Ante*, p. 604.
(2) Vol. iii. pp. 2, 5.
(3) Co. Rep. 8, 156 a.
(4) 1 B. & A. 282.
(5) Law Rep. 2 C. P. 453.

C. J. B. 1871

Ex parte Birmingham and Staffordshire Gas Light Company.

In re Fanshaw and Yorston.

"means," but not the same rights, as landlords have for the recovery of rent. And this is clear from the 187th section of the local Act, which provides that the distress shall be levied upon the goods "of the person liable to pay" the debt; whereas a landlord may distrain upon all goods found upon the premises, irrespective of ownership. The 187th section applies to this distress; and the goods in question were not, when they were seized, and are not now, the property of the person liable to pay the debt, but of the creditors generally, and vested in the trustee at the time of his appointment, and his title related back to the filing of the Petition; and therefore the Appellants had no power to levy the distress.

Mr. *De Gex*, in reply:—

The 187th section of the gas company's Act applies only to distresses directed to be levied under sects. 158 and 159, and does not in any way limit the company's rights under the 155th section.

Sir James Bacon, C.J.:—

The 155th section of the principal Act, under which the Appellant company is constituted, gives to the company all the means —and by this it was clearly intended to give them also all the rights—which landlords have for the recovery of rent in arrear. Among these rights is included the power to distrain, subject to the limitation contained in the 34th section of the *Bankruptcy Act*, 1869. I think it quite plain that a distress for rent cannot be considered to be included in the expression "legal process," inasmuch as no legal process whatever is necessary; and the landlord may, if he thinks proper, distrain with his own hands. As little can it be called an execution, for an execution is the result of a judgment which has been recovered in some Court of Law, but to a distress no legal proceedings whatever are necessary. The right of landlords to distrain after the presentation by the debtor of a petition for liquidation by arrangement is clear, from the express provisions of the 34th section of the *Bankruptcy Act*, 1869; and in this case the company had a similar right, of which it would be most unreasonable to deprive them. I am of opinion, therefore, that

the Appellants are entitled to retain the goods distrained; and the injunction must be dissolved.

Order discharged without costs.

C. J. B.
1871
Ex parte BIRMINGHAM AND STAFFORDSHIRE GAS LIGHT COMPANY.
In re FANSHAW AND YORSTON.

Solicitors for the Appellants: Messrs. *Tucker & Lake*, agents for Messrs. *Wragge & Evans, Birmingham.*

Solicitor for the Respondents: Mr. *H. G. Field*, agent for Mr. *W. A. Green, Wolverhampton.*

Ex parte LEVY & CO.
In re VARBETIAN & CO.

C. J. B.
1871
March 20.

Bankruptcy Act, 1869, *s.* 126—*Gen. Rules of Jan.*, 1870, *Rule* 295—*Composition—Registration of Resolution—Examination of Debtor and Witnesses.*

The proper time for investigation into the affairs of a debtor, who has filed a Petition for liquidation by arrangement with his creditors, is at the meetings of creditors; and the Registrar has no power, upon the presentation to him for registration of a resolution for composition, to direct an examination before him of the debtor or other witnesses.

ON the 24th of November, 1870, *Haron Varbetian*, who traded in *London* under the style of *Varbetian & Co.*, having become involved in pecuniary difficulties, filed a Petition for liquidation by arrangement with his creditors under the 125th section of the *Bankruptcy Act*, 1869. At the first meeting of creditors, which was held on the 12th of December, 1870, a resolution to accept a composition of 3*s.* in the pound was passed by the statutory majority, and duly confirmed at the second meeting on the 22nd of December.

When the resolution was brought before the Registrar for registration under Rule 295 of the Gen. Rules of Jan., 1870, Messrs. *Levy & Co.*, who were among the creditors, and had proved their debt at the second meeting, opposed the registration on the ground that the statement of affairs furnished by the debtor was untrue; that the majority of the proofs had been improperly allowed; and that the resolution had been passed with a view of benefiting the debtor, and not *bonâ fide* as the most advantageous arrangement which could be made for the creditors generally. They desired that further inquiries into the affairs of the debtor should be made,

C. J. B.
1871
Ex parte Levy & Co.
In re Varbetian & Co.

especially with regard to a partnership between him and two of his brothers, which, according to his own account, had been dissolved for some years past, but which Messrs. *Levy & Co.* maintained was still subsisting; and, with a view to obtaining additional information on these points, they applied for delay in the registration of the resolution, and for an examination upon oath before the Registrar of the debtor and other witnesses.

The Registrar considered that his authority extended only to registering, or refusing to register the resolution, and that he had no power to direct the examination; and as no objections to the proofs had been marked upon them (as provided by Rule 271 of Gen. Rules of Jan., 1870), and no sufficient grounds for rejection had been shewn, he registered the resolution.

An *ex parte* application to cancel the registration, and to make the desired inquiries and examination, was afterwards made on behalf of Messrs. *Levy & Co.* to Mr. Registrar *Pepys*, and by him referred to the Chief Judge.

Mr. *Reed*, for *Levy & Co.*:—

Under Rule 295, the Registrar is not to register the resolution, unless he is satisfied that "the requirements of the statute have been complied with;" and one of these requirements is, that the debtor's statement of affairs be true, and the proofs of creditors who have voted for the resolution properly admissible; and this the Registrar cannot ascertain, unless he may take evidence. There is no power to examine the debtor and witnesses upon oath at the meetings, and it was intended to give the Registrar that power.

Mr. *Finlay Knight*, for other creditors, was not called upon.

Sir James Bacon, C.J.:—

The duties of Registrars with respect to the registration of resolutions are ministerial, and not judicial, and no power has been given them to institute such an inquiry as has been suggested in this case. The proper time for investigation into the affairs of the debtor is at the meetings of creditors. The debtor may then be examined, and though his evidence is not upon oath, still it may be taken down in writing, and laid before the

Registrar, and if from that evidence it appears to him that there is reason to suspect the truth of the debtor's statement of affairs, the remedy is plain—the Registrar will reject the resolution on the ground that "the requirements of the statute" have not been complied with. Under Rule 295, it is his duty, if required by the proper notice so to do, to hear any creditor or his counsel upon the state of the proceedings; and whether he registers or rejects the resolution, an appeal lies against his decision. An injunction restraining the registration may also be obtained upon proper cause shewn and, moreover, registration may be annulled or prevented even without proof of fraud.

No hardship or difficulty will result in a case of this kind if the Act and rules are observed, but great inconvenience would arise if, after proper inquiries have been made at the meetings, a second examination might be instituted before the Registrar. To constitute the Registrar a tribunal for inquiring into everything which had taken place at the meetings would be to introduce something quite new into the Act. I am clearly of opinion that the Registrar had no authority to direct such an examination as has been demanded by the Applicants in this case.

Application refused, without costs.

Solicitor for the Applicants: Mr. *W. A. Crump.*

Solicitors for other Creditors: Messrs. *Rooks, Kenrick, & Harston.*

END OF VOL. XI.

INDEX.

ABSOLUTE GIFT—Time of vesting—Gift over on death before marriage - - 222
See DEATH COUPLED WITH CONTINGENCY.

ACCEPTANCE OF SHARES—*Company—Winding-up—Contributory—Notice of Allotment—Posting Letter.*] Mere posting of a letter of allotment of shares in a company to an applicant at the proper address is not such a communication of the allotment as to bind the applicant. *In re* CONSTANTINOPLE AND ALEXANDRIA HOTEL COMPANY. REIDPATH'S CASE - - - - 86

2. —— *Contributory—Promotion-money—Qualification of Directors—Paid-up Shares.*] A director of an old company, agreed to be sold to a promoter on behalf of a new company, was named in the articles of the new company as director, and though he never applied for shares, fifty were allotted to him and registered in his name as paid-up shares, for which the promoter gave a cheque out of several he had received on account of purchase-money stipulated by the articles to be paid to him under a false name, there being in fact no money in hand. The shares were registered as fully paid up. The director never received the certificates or attended board meetings, or was aware that shares had been allotted to him, but he attended an extraordinary board meeting, at which he described himself as nominal chairman, and excused himself on the score of ill-health from taking part in the affairs of the company. A proxy was used on his behalf, which he denied having given:—*Held*, that he was a shareholder for fifty unpaid shares. *In re* EMPIRE ASSURANCE CORPORATION. LEEKE'S CASE - - 100

3. —— *Company — Directors—Qualification—Paid-up Shares—Agreement with Promoter to evade Liability.*] A company was formed to carry on the business of *D.* The shares were of £10 each, and were to be paid up in full on acceptance. The qualification of the directors was twenty-five shares, and the directors were empowered to purchase the business for £170,000 in shares. At *D.'s* request eight persons agreed to become directors on having their qualification found. They were appointed directors, and their names were entered on the register for twenty-five shares each. They then passed a resolution to buy the business for £168,000 in shares and £2000 in cash, and eight cheques were drawn on behalf of *D.* for £250 each, and one of them handed to each of the directors, who indorsed them, and handed them to the secretary, by whom they were passed on to *D.* The shares were then entered as fully paid up, and a receipt for £2000 was given by *D.*, and entered on the books of the company:—*Held*, that it was necessary to the validity of the contract to purchase the business that the directors should be previously qualified; that what had occurred subsequently did not amount to payment; and that, consequently, the directors were properly on the list of contributories for unpaid shares. *In re* DISDERI & Co. - - - - - 242

ACCEPTANCE OF SHARES—*continued.*

ACCEPTANCE OF TITLE—Possession—Willing purchaser - - - - 391
See VOLUNTARY SETTLEMENT.

ACCOMMODATION WORKS—*Railway Acts—Jurisdiction of Magistrates—Concurrent Jurisdiction in Equity.*] Where, by an Act of Parliament, power is given to the justices of the county to direct such works to be constructed and maintained by a railway company as they may consider requisite for carrying out an efficient drainage of the adjoining land, the Court will refuse to exercise a concurrent jurisdiction as well after the completion of the railway as during its construction. HOOD *v.* NORTH EASTERN RAILWAY COMPANY - - - - - - 116

ACCOUNT—Bill for money demand - - 254
See BILL FOR ACCOUNT.

ACT OF BANKRUPTCY—Petition for liquidation by arrangement—Title of trustee 604
See LIQUIDATION BY ARRANGEMENT. 1.

ADJOINING COAL-MINE—*Wrongful working—Mode of taking Account—Form of Decree.*] Where a mine-owner had passed his boundary, and taken coals from his neighbour's mine:—*Held*, that he was liable to account for the value of the coals at the pit's mouth, with just allowances for the cost of raising, but not of getting or severing.—Form of decree. LLYNVI COMPANY *v.* BROGDEN - 188

ADJOINING PROPERTY—Nuisance - 338
See NUISANCE TO ADJOINING PROPERTY.

ADMINISTRATION—Claim for breach of trust—Apportionment - - - 382
See APPORTIONMENT—TENANT FOR LIFE AND REMAINDERMAN.

—— Real estate—Summons - - - 8
See ADMINISTRATION SUMMONS.

ADMINISTRATION SUMMONS—*Practice—Real Estate—Trust for Sale after Five Years*—15 & 16

ADMINISTRATION SUMMONS—*continued.*

Vict. c. 86, *s.* 47.] The Court has jurisdiction, under 15 & 16 Vict. c. 86, s. 47, to make an order on summons for the administration and sale of a testator's real estate devised to trustees, who were also executors, in trust for sale, with a proviso that part thereof should not be sold till after five years unless in the meantime a certain sum could be obtained for it. De la Salle *v.* Moorat - 8

ADVANCEMENT—*Gift to a Child—Presumption of Intention—Absolute Gift.*] A testator, by his will, settled £1000 Reduced Annuities on each of his three granddaughters, the children of his only son, and two years afterwards he transferred a sum of £3200 Reduced Annuities, which was all the property he possessed, into the name of his son. He died at the age of ninety-four, having resided the last ten years of his life with his son, who was a man of considerable property:—*Held*, that the transfer to the son operated as an absolute gift to him, free from any trusts. Hepworth *v.* Hepworth - - - - - 10

2. —— *Marriage Settlement—Power—Post-nuptial Settlement by Son of the Marriage.*] A power in a marriage settlement to advance to a son of the marriage part of the trust funds for placing or establishing him in any business, profession, or employment, or otherwise for his advancement or preferment in the world:—*Held*, to authorize the payment of part of the trust fund to the trustees of a post-nuptial settlement made by a son in favour of himself and his wife and the issue of their marriage, neither the son nor his wife being entitled to any property producing an immediate income, and the son being engaged in study, preparatory to entering the legal profession. Roper-Curzon *v.* Roper-Curzon - - - - - - 452

AFFIDAVIT—Insane witness—Form of jurat 420
See Insane Witness.

AFTER-ACQUIRED PROPERTY—Will speaking from death - - - - 542
See Will speaking from Death.

"ALL THE REST"—*Will—Real Estate.*] Testatrix, after a gift of her house and garden (which were leasehold, though not so described) and several pecuniary legacies, directed that "all the rest" should be divided between the persons in her will named:—*Held*, that the words included realty as well as personalty. Attree v. Attree - 280

AMALGAMATION OF COMPANIES—*Transfer of Business—Ultrà vires—Winding-up—Companies Act*, 1862, *s.* 161.] An unregistered company which has no power under its deed of settlement to sell or transfer its business to another company may, nevertheless, carry into effect an agreement for that purpose by registering under the *Companies Act*, 1862, passing a resolution for voluntary winding-up, and directing the liquidators to carry out the agreement. Southall *v.* British Mutual Life Assurance Society - 65

2. —— *Transfer of Assets—Failure of Indemnity—Leases, Mortgages, and Re-assurance Policies—Vendor's Lien—Principal and Surety.*] By an agreement in 1865 between three directors of the *Albert Company* and three directors of the *Western Society*, it was agreed that the company should take upon itself all the liabilities of the *Society*; and that in consideration of such undertaking the *Society* should transfer to the *Company* all the funds and property of the *Society*.—Amongst the latter were a lease which had been taken in the name of a trustee for the *Society*; mortgages which had been made to trustees for the *Society* to secure sums advanced by the *Society* to mortgagors; and re-assurance policies which had been effected by the *Society* with other assurance companies on the lives of their own policy-holders, in order to cover part of the liability. On the execution of the agreement, the lease, mortgage deeds, and re-assurance policies were handed over, but the lease and mortgages were not, and had not since been, assigned to the *Company*. Several policy-holders of the *Society* did not accept the united *Company* as their debtors.—In 1869 the *Company*, and afterwards the *Society*, were ordered to be wound up. The indemnity of the *Company* having thus failed:—*Held*, that the liquidator of the *Society* was not entitled, on the principle of lien for unpaid purchase-money, to have delivered back to him by the liquidators of the *Company* the lease, mortgages, and re-assurance policies which had been handed over to the *Company*:—*Held*, also, that the liquidator of the *Society* was not entitled, on any principle analogous to the right of a surety who discharges the debt of his principal, to the benefit of the re-assurance policies.—Doctrines of vendor's lien and principal and surety discussed. *In re* Albert Life Assurance Company. *Ex parte* Western Life Assurance Society - - - - - 164

AMBIGUITY—Will—Description of legatee 578
See Mistake in Will.

AMENDMENT—Interrogatories - - 425
See Amendment of Interrogatories.

—— Petition—Subsequent facts - - 252
See Amendment of Petition.

—— Special case - - - 264, 363
See Special Case. 1, 2.

AMENDMENT OF INTERROGATORIES—*Practice.*] After exceptions for insufficiency to an answer had been allowed, the Plaintiff obtained an order of course to amend his bill and interrogatories, and a new copy of the amended interrogatories, embracing much that was contained in the original interrogatories, was served upon the Defendant:—*Held*, that, as at the time of obtaining the order to amend the Plaintiff had not had any answer to the bill, he was entitled, on such amendment, to serve the Defendant with amended interrogatories; and a motion by Defendant to take them off the file was refused. Viscount Newry *v.* Earl Kilmorey - - - 425

AMENDMENT OF PETITION—*Practice—Facts subsequent to leave to Amend.*] A Petition may be amended by stating facts which have taken place since leave to amend was given. *In re* Westbrook's Trusts - - - - 252

ANNUITY—Succession duty—Foreign domicil of testator - - - - 378
See Succession Duty.

APPORTIONMENT—TENANT FOR LIFE AND REMAINDERMAN — *Administration — Claims against Testator's Estate—Compromise—Appor-*

APPORTIONMENT—TENANT FOR LIFE AND REMAINDERMAN—*continued.*

tionment between Capital and Income.] A claim made against the estate of a testator, founded on an alleged breach of trust, was compromised by the payment of a large sum several years after the testator's death:—*Held*, that for the purpose of dealing between the tenants for life and remaindermen under the trusts of the will, the sum paid was to be treated as composed of a principal debt due on the day on which the transaction took place out of which the claim originated, of interest at £5 per cent. from that day up to the date of the testator's death, and of interest at £4 per cent. on the aggregate of the said principal and interest from the testator's death to the time of payment; and that the principal and interest up to the testator's death were chargeable against *corpus*, and the subsequent interest against income. Maclaren *v.* Stainton - - - 382

BANKRUPTCY—Bill of sale—Priority - 209
See Bill of Sale.

—— Examination of debtor and witness - 619
See Liquidation by Arrangement. 2.

—— Injunction against legal process - 204, 615
See Injunction in Bankruptcy. 1, 2.

—— Liquidation by arrangement - 604, 619
See Liquidation by Arrangement. 1, 2.

BILL FOR ACCOUNT—*Jurisdiction—Money Demand—Fiduciary Relationship.*] Where a Court of Law can do as full justice to the subject in dispute as can be done in equity, this Court will not interfere to stay the proceedings at law. But when the completeness of the relief at law is doubtful, and questions of account, of the right to raise a case of wilful default, and of fiduciary relationship between the parties are involved, the Court will entertain a suit for the purpose of transferring the proceedings from law to equity, and will grant an injunction until the hearing. Southampton Dock Company *v.* Southampton Harbour and Pier Board - - - 254

BILL OF EXCHANGE—Drawn against forged bill of lading - - - 398
See Forged Bill of Lading.

BILL OF LADING—Forgery—Bill of exchange
See Forged Bill of Lading. [398

BILL OF SALE—*Bankruptcy Act*, 1869—*Priority.*] *A.* and *P.* were each of them holders of a bill of sale on the same part of a non-trader's property. *A.'s* security was dated the 10th of February, 1870, and registered on the 2nd of March, 1870. *P.'s* was dated the 28th of February, 1870, and registered on the 18th of March, 1870. *P.* had no notice of *A.'s* bill of sale at the date of his own, and took possession before he received notice. On the 4th of April *A.* gave notice of his charge, but notwithstanding this *P.* proceeded to sell the goods. After the seizure, and before the sale, the debtor was adjudicated bankrupt:—*Held*, that the fact that *P.* had been the first to take possession did not give him priority over *A.*, and that the latter was entitled to the first charge upon the proceeds of the sale. *Ex parte* Allen. *Ex parte* Page. *In re* Middleton - - - 209

BONDS—Payable to bearer - - - 478
See Debentures.

BREACH OF TRUST—Negligence of solicitor—Loss of trust fund - - - 74
See Investment by Trustees. 1.

—— Suit for—Decree in administration - 439
See Suits for similar Objects.

BREWERS—Custom of—Advances on public-house - - - - 459
See Mortgage of Public-house.

BURIAL-GROUND—*Rights of Rector—Freehold of Churchyard—Burial Fees—Lands Clauses Act—Receipt of "Rents and Profits"—Dividends on Fund in Court.*] A rector having the freehold of a churchyard, and having enjoyed the right to burial fees, is the person entitled, under sect. 70 of the *Lands Clauses Act*, to the receipts of the rents and profits. Therefore, where a piece of land constituted by Act of Parliament the churchyard of the parish, but which had been closed for burials under an Order in Council, was taken under sect. 70 of the *Lands Clauses Act*, and the purchase-money paid into Court, though the land at the time it was taken was entirely unproductive either as regarded burial fees or otherwise:—*Held*, that, whatever might be the ultimate destination of the *corpus* of the fund, the dividends, so long as it remained in Court, must be paid to the rector of the parish for the time being. *Ex parte* Rector of Liverpool - - - 15

2. —— *Rights of Rector—Freehold of Churchyard—Burial Fees—Lands Clauses Act—Receipt of "Rents and Profits—Trust for the Use of the Inhabitants — Additional Ground provided by Rates—Dividends on Fund in Court.*] A rector who has enjoyed the right to burial fees from a burial-ground, the freehold of which is vested in trustees, is the person entitled under sect. 70 of the *Lands Clauses Consolidation Act* to the receipt of the rents and profits.—By an Act of Parliament reciting the insufficiency of an existing churchyard, the rector and churchwardens and certain other persons were constituted trustees, and empowered to enlarge the existing churchyard and to buy land for an additional burial-ground, to be conveyed to the rector and churchwardens "for the use of the inhabitants of the parish." In 1849 a portion of the land purchased under the Act was taken by a railway company, and the purchase-money paid into Court under the *Lands Clauses Consolidation Act*. The burial-ground was subsequently closed for burials:—*Held*, that, inasmuch as the land was intended as an addition to the churchyard, the rights of the rector therein were the same as his rights in the old churchyard, so far as they were not affected by the Act under which the land was purchased, and that he was entitled to the dividends on the fund in Court so long as it remained there. *Ex parte* Rector of St. Martin's, Birmingham - 23

CAPITAL—Reduction of—Company - 356
See Reduction of Capital and Shares.

CAPITAL AND INCOME—Apportionment of sum due from testator - - - 382
See Apportionment—Tenant for Life and Remainderman.

CASES—*Attorney-General* v. *Wax Chandlers' Company* (Law Rep. 8 Eq. 452), distinguished - - - - 35
See Charity not exhausting whole Income.

CASES—*continued.*

—— *Brownsword* v. *Edwards* (2 Ves. Sen. 243) considered - - - - 514
See Dying without Issue.

—— *Carter* v. *Carter* (3 K. & J. 617) followed 53
See Purchase for Value without Notice.

—— *Cole* v. *Scott* (1 Mac. & G. 518) disapproved [542
See Will speaking from Death.

—— *Grey* v. *Pearson* (6 H. L. C. 61) considered [514
See Dying without Issue.

—— *Ive* v. *King* (16 Beav. 46) followed - 48
See Gift, Original or substitutional.

—— *Le Grice* v. *Finch* (3 Mer. 50) commented on - - - - - 506
See Legacy, Specific or demonstrative.

—— *Ogilvie* v. *Currie* (37 L. J. (Ch.) 541) commented on - - - - 215
See Misrepresentation in Prospectus.

—— *Riley* v. *Garnett* (3 De G. & Sm. 629) not followed - - - - 559
See Failure of Life Estate.

—— *Seaman* v. *Wood* (22 Beav. 581) commented on - - - - - 499
See Severance of Gift to Class.

—— *Webster* v. *Boddington* (26 Beav. 128) commented on - - - - 499
See Severance of Gift to Class.

CERTIORARI—Lord Mayor's Court - 556
See Lord Mayor's Court.

CHARGE—Property recovered by solicitor 181
See Solicitor's Lien.

CHARGING ORDER—Married Women's Property Act - - - - - 470
See Married Women's Property Act.

CHARITY—Mortmain - - - 1
See Mortmain.

—— Not exhausting the whole income - 35
See Charity not exhausting whole Income.

CHARITY NOT EXHAUSTING WHOLE INCOME—*Charitable Devise—Surplus.*] A testator devised certain houses and tenements to the Master, Wardens, and Commonalty of the *Company of Merchant Taylors*, "to this intent and upon this condition," that the Master and Wardens should every year, out of the rents, provide for twelve poor men and twelve poor women of the city of *London* certain garments of a specified price; and he directed the chamberlain and town clerk of the city of *London* to put the company in mind and see that the garments were given, and gave to them for so doing 10*s.* a piece out of the rents; and so that the whole residue of the rents the Master and Wardens should maintain and gather into a stock, and therewith repair, and if need be rebuild the tenements: and in case the Master and Wardens should be remiss and negligent in delivering the said garments, then he willed that the parson, churchwardens, and parishioners of *St. Michael's, Cornhill*, should enter upon the lands and tenements and hold the same, "to this intent and upon this condition," that they

CHARITY NOT EXHAUSTING WHOLE INCOME—*continued.*

should bestow the yearly rents in and upon the garments of the twelve poor men and twelve poor women, and upon the reparation of the tenements, and the said 20*s.* to the chamberlain and town clerk. At the death of the testator the income arising from the tenements was considerably greater than was required for the charitable purposes expressed in the will, and the payment of the 20*s.* to the chamberlain and town clerk, and subsequently the income became very much greater:—*Held*, that the *Merchant Taylors' Company* were not entitled to the surplus for their own benefit, but were bound to apply it for charitable purposes.—*Attorney-General* v. *Wax Chandlers' Company* (Law Rep. 8 Eq. 452; Ibid. 5 Ch. 503) distinguished and explained. Merchant Taylors' Company *v.* Attorney-General [35

CHILD—Gift to—Presumption of intention - 10
See Advancement. 1.

CHILDREN—Legitimated by foreign law—Legacy duty - - - - - 474
See Legacy Duty.

CHILDREN OF BROTHERS AND SISTERS—*Will—Children of Brothers and Sisters dead at the date of the Will—Words "Et cetera."*] Testator bequeathed "all my furniture, &c.," together with six freehold houses, to his wife for life, and after her decease, as follows: "One half to my brothers and sisters for their life and then to come to their children and in the same manner to my wife brother and brothers children and grandchildren."—At the date of the will testator had one brother and three sister's living, another brother and another sister having died, both leaving children. At the same date there was one wife's brother living, two wife's brothers having died, one without issue living, the other leaving children and grandchildren. At the date of the testator's death his wife and all his brothers and sisters were dead, but his wife's brother was still living:—*Held*, that one moiety of the property was divisible among all the children living, at the testator's death, of all his brothers and sisters who left children, *per stirpes;* that the wife's surviving brother took an estate for life in the other moiety, and that after his death it was divisible amongst all the children and grandchildren living at his death, or coming into existence during the lifetime of the tenant for life, of himself and the other wife's brothers who left children or grandchildren; the families taking *per stirpes*, and the children and grandchildren of each family *per capita*. Testator was possessed, at his death, of some waterworks company shares:—*Held*, that the shares did not pass under the expression "&c." Barnaby *v.* Tassell - - - - 363

"CHILDREN OR LEGAL ISSUE."—*Will and Codicil—"Or" and "and."*] Testator devised lands to his daughter *A.* in fee, and by codicil he ordered that the lands given by his will to *A.* should be not so given, but to all the children or legal issue of *A.*, to be divided amongst them in equal shares, after the decease of his daughter *A.* and her husband. She had ten children, one of whom died in the lifetime of the testator, and three, who survived him, died in her lifetime:—*Held*, that

"**CHILDREN OR LEGAL ISSUE**"—*continued.*
the children of *A.*, who were living at the death of the testator, and those who were born afterwards, took vested interests in fee, to the exclusion of grandchildren and great grandchildren. HOLLAND *v.* WOOD - - - - 91

CHURCHYARD—Rights of rector - 15, 123
See BURIAL-GROUND. 1, 2.

CLASS—Children of brothers and sisters - 363
See CHILDREN OF BROTHERS AND SISTERS.

—— Period of ascertaining - - - 43
See GIFT, ORIGINAL OR SUBSTITUTIONAL.

—— Severance of objects - - - 499
See SEVERANCE OF GIFT TO CLASS.

COAL-MINE—Wrongful working—Mode of taking account - - - - 188
See ADJOINING COAL-MINE.

COMMON OF VICINAGE—Production of title-deeds of lord of manor - - 284
See PRODUCTION OF DOCUMENTS.

COMPANY—Acceptance of shares 86, 100, 242
See ACCEPTANCE OF SHARES. 1—3.

—— Amalgamation - - - 65, 164
See AMALGAMATION OF COMPANIES. 1, 2.

—— Debentures payable to bearer - - 478
See DEBENTURES.

—— Leave to proceed after winding-up - 248
See LEAVE TO PROCEED AFTER WINDING-UP.

—— Lloyd's bonds - - - - 157
See LLOYD'S BONDS.

—— Misrepresentation in prospectus - 215
See MISREPRESENTATION IN PROSPECTUS.

—— Paid-up shares - - - - 131
See PAYMENT BY MONEY'S WORTH.

—— Qualification of director - - 192
See QUALIFICATION OF DIRECTOR.

—— Reconstruction - - - - 109
See RECONSTRUCTION OF COMPANY.

—— Reduction of capital and shares - 356
See REDUCTION OF CAPITAL AND SHARES.

—— Shares—Payment by money's worth - 131
See PAYMENT BY MONEY'S WORTH.

—— Unregistered—Registration for purpose of winding-up - - - - 321
See WINDING-UP PETITION. 2.

—— Winding-up—Costs—Taxation - 151
See TAXATION OF COSTS.

—— Winding-up petition - - 149, 321
See WINDING-UP PETITION. 1, 2.

COMPOSITION WITH CREDITORS — Distinguished from liquidation by arrangement
See INJUNCTION IN BANKRUPTCY. 1. [204

—— Registration of resolutions - - 619
See LIQUIDATION BY ARRANGEMENT. 2.

CONFIRMATION—Breach of trust—Infant—Settlement by the Court - - 439
See SETTLEMENT BY THE COURT.

CONTEMPT, PROCESS OF—*Practice—Injunction—Motion to Commit—Amendment of Bill—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4.] An injunction, if granted upon merits, is not dissolved by amendment of the bill, though the amendment be without saving the injunction.—An order was made on a Defendant to deliver to a receiver bills and cheques, "or" to pay moneys received in respect of them. The Defendant said he delivered over the only bill in his possession, and that he had cashed the others, but did not say whether before or after the order; and then said that neglect to pay over the moneys (which he admitted he had received) was merely making a default in payment of a sum of money within the meaning of the *Debtors Act*, 1869, s. 4:—*Held*, that the Defendant had committed a clear breach of the order, and that the *Debtors Act* had no application; and order for committal accordingly. HARVEY *v.* HALL - - - - - 31

2. —— *Pauper Defendant—Costs of Plaintiff—Discharge from Custody—Suitors' Fund—Courts of Justice (Salaries and Funds) Act*, 1869 (32 & 33 *Vict. c.* 91)—*Practice.*] On motion on behalf of a pauper Defendant in contempt, that he may be discharged from custody, the Court has no authority, under the *Courts of Justice (Salaries and Funds) Act*, 1869, to order the costs of the Plaintiff, upon his own application, to be provided for by the Treasury. HALL *v.* HALL - - 290

CONTRACTOR—Lloyd's bonds - - 157
See LLOYD'S BONDS.

CONTRIBUTORY—Acceptance of shares 81, 100, [242
See ACCEPTANCE OF SHARES. 1—3.

—— Paid-up shares - - - - 131
See PAYMENT BY MONEY'S WORTH.

—— Qualification of director - - 192
See QUALIFICATION OF DIRECTOR.

—— Reconstruction of company - - 109
See RECONSTRUCTION OF COMPANY.

—— Witness in winding-up—Cross-examination
See WITNESS IN WINDING-UP. [428

CONVERSION — *Will — Construction — Wasting Property—Implied Discretion for Conversion—Discretion of Trustees.*] A testator, after a specific bequest, gave all his residuary estate, both real and personal, to trustees (whom he also appointed executors) upon trust, as soon as conveniently might be after his death, to sell so much and such part thereof as they might think necessary for paying all his mortgage and other just debts and funeral and testamentary expenses; and he directed the trustees, out of the moneys to arise from such sale and other his residuary estate, to pay all such sums of money as might at the time of his decease be charged on his freehold or leasehold estates by way of mortgage and all other his just debts and funeral and testamentary expenses, and to invest so much of the moneys as might remain after such payments; and to stand possessed of such investments and all other his residuary estate and the income thereof upon trust for several persons successively for their respective lives, with remainders over. Part of the testator's residuary estate consisted of a leasehold, which was at the time of his death subject to a mortgage. Shortly after the testator's death, the trustees paid off the mortgage out of the testator's estate:—*Held*, that, upon the construction of the will, the trustees had a discretion as to what part of the testator's estate should be converted; that the Court could not interfere with such discretion, at all events if a considerable time had elapsed since it had been exercised; and that the tenants for life were entitled to enjoy the leaseholds in specie. *In re* SEWELL'S ESTATE - - 80

CORPORATION—Power to take money bequeathed or devised - - - - 1
See Mortmain.

CORPUS AND INCOME—Costs—Fund in Court—Dividends - - - - 155
See Trustee Relief Act.

COSTS—Heir-at-law's opposition to will—Issue directed by Court - - - 472
See Unsuccessful Opposition to Will.

—— Partition suit - - - - 90
See Partition Suit. 1.

—— Pauper Defendant in contempt—Suitors' fund - - - - - 290
See Contempt, Process of. 2.

—— Trustee Relief Act - - - 155
See Trustee Relief Act.

—— Winding-up—Taxation - - 151
See Taxation of Costs.

COVENANT—After-acquired property - 279
See Covenant to settle.

—— Satisfaction—Will—Hotchpot clause 142
See Hotchpot Clause.

COVENANT TO SETTLE—*Marriage Settlement—After-acquired Property.*] A marriage settlement contained a covenant that if, during the coverture, the wife should become entitled to any property of the value of £500 or upwards, it should be vested in the trustees upon the trusts of the settlement. After the marriage a sum of £5499 19*s.* 1*d.* was bequeathed upon such trusts as the wife should appoint. She executed eleven successive deeds, several of them on the same day, by each of which she appointed £499 19*s.* 11*d.* for her own separate use:—*Held*, that the money in question was not bound by the covenant in the settlement, and that the wife was entitled to the whole. Bower *v.* Smith - - - - - - 279

CROSS-EXAMINATION—Witness in winding-up
See Witness in Winding-up. [428

CROSS SUIT—*Practice—Evidence—Replication—Motion for Decree.*] On the day on which the evidence was closed in a suit in which replication had been filed, the Plaintiffs in a cross suit served notice of motion for decree in their suit.—A month's time was obtained by the Plaintiff in the original suit for putting in his evidence upon the motion for decree, and the Plaintiffs in the cross suit subsequently filed a large mass of affidavits in reply. On motion by Plaintiff in the original suit to suppress this evidence in reply, on the ground that it was an unfair attempt by Plaintiffs in the cross suit to obtain an advantage by putting in new evidence on matters in issue in the original suit after publication had passed:—*Held*, that there had been no such irregularity on the part of Plaintiffs in the cross cause in the conduct of their suit as to justify the Court in suppressing the evidence filed by them in reply, but that cross-examination in Court would be directed upon the affidavits in reply, notwithstanding such affidavits were filed in a suit intended to be heard on motion for decree. Hall *v.* Hargreaves. Hargreaves *v.* Hall [414

CUSTOM—Publicans—Brewer and Distiller—Advance on public-house - - 459
See Mortgage of Public-house.

DEATH—Condition of, coupled with contingency - - - - 222
See Death coupled with Contingency.

—— Presumption of - - - - 236
See Presumption of Death.

DEATH COUPLED WITH CONTINGENCY—*Will—Absolute Gift at Twenty-five—Gift over on Death before Marriage—Time of Vesting.*] A testator bequeathed all he should die possessed of to be equally divided between his sisters *A.* and *S.* for their sole use and benefit, to be invested in his sisters' names as they should direct; his sister *A.* (who was then over twenty-five years of age) to have the immediate control of her share, and his sister *S.* upon attaining twenty-five years, until which time it was to be held in trust for her. And in case of the death of either of his sisters before him, or before marrying and having children, the whole of the property to go to the survivor. The testator's elder sister *A.* married and had children:—*Held*, that the gift over to the surviving sister, on the contingency of the death of the other before marrying and having children, was referable to such death occurring before she should attain the age of twenty-five years; and that the younger sister, on attaining twenty-five, though still unmarried, became absolutely entitled to a moiety of the property. Clark *v.* Henry - - 222

DEBENTURES—*Promissory Notes—Negotiable Instruments—Contract to pay the Bearer—Equities between Company and original Holder—Amount of Interest—Winding-up under Supervision—Supervision Order relating back to confirmatory Resolution.*] The directors of a company, having power by its memorandum of association to borrow money and to issue transferable or other bonds, mortgages, or debentures, had, under its articles of association, large powers for issuing "debentures, bonds, obligations, or other securities, either specifically charged on any property of the company, or not so charged, in any form or manner, or for any amount," not exceeding the nominal capital of the company, and a specific power to issue and indorse negotiable instruments.—The company issued in payment to vendors of land to them instruments described on their face as "debenture bonds," and stamped as bonds, and expressed that the company "bind themselves and their successors to pay the bearer the principal sum of £20." The words with respect to interest were in similar form, and there was no charge on any of the property of the company. The instruments were sold in open market.—The company being now in course of winding-up, it being admitted that the company had equities against the parties to whom the instruments were originally issued:—*Held*, 1. That the instruments were promissory notes, or if not promissory notes, negotiable instruments, and amounted to contracts to pay any one who might happen to be the bearer. 2. That, consequently, holders for value without notice of the equities were entitled to prove for the amount due free from equities. 3. That the right to prove was not affected by the fact that holders had purchased after the passing of resolutions to wind up the company, though without notice of their having been passed.—The winding-up which commenced by resolutions duly confirmed, was being continued under the supervision of the Court:—*Held*,

DEBENTURES—*continued.*
that the supervision order related back for all purposes to the confirmatory resolution, and consequently that the proof could only be made for the principal and interest to the date of the confirmatory resolution; and that this question was not affected by the fact that interest had been paid to a later date. *In re* Imperial Land Company of Marseilles. *Ex parte* Colborne and Strawbridge - - - - - - 478

DEFECTIVE EXECUTION—Evidence in equity
See Reference to Power. [371

DEMONSTRATIVE LEGACY - - 506
See Legacy, Specific or demonstrative.

DEVISE—Failure of life estate—Equitable remainder - - - - 559
See Failure of Life Estate.

DIRECTORS—Qualification of—Paid-up shares [100, 242
See Acceptance of Shares. 2, 3.

DISCOVERY OF DEFENDANT'S CASE—*Pleading—Exceptions to Answer.*] In 1862 a policy of assurance was granted upon the life of *A.*, who about the same time went to reside in *India*. On account of *A.'s* bad state of health an additional premium was charged, but the Indian extra rate was not charged by the company, who alleged that they did not know of *A.'s* departure for *India*. In 1868, the days of grace having expired, the company declined to reinstate the policy except upon the terms of payment of the Indian extra rate for the period that had elapsed since the policy was effected, relying upon the condition contained in the policy, that it should be void if the assured should go beyond *Europe* without obtaining permission of the directors on payment of a premium adequate to the extra risk. *A.* filed his bill, praying a declaration that he was entitled to the benefit of his policy upon payment of the premium originally charged, with liberty to reside in *India* without extra premium; and interrogated the company as to their habit with regard to similar cases at the time his policy was issued, calling upon them to take ten policies immediately preceding and immediately subsequent to the date of *A.'s* policy, upon the lives of persons about to start for *India* in the Civil Service, and to state whether any such licenses and extra payments were given or made in such cases, and the form of the respective policies:—*Held*, upon exceptions to answer, that the Defendants were bound to give the discovery sought by the interrogatory, for the purpose of enabling the Plaintiff to establish the case of conduct and waiver in similar cases raised by the equity of his bill. Girdlestone *v.* North British Mercantile Insurance Company - - - - 197

DISCRETION—Trustees—Investment - 439
See Investment by Trustees. 2.

—— Trustees—Investment - - - 80
See Conversion.

DISTRESS FOR RENT — Injunction against—Bankruptcy - - - 204, 615
See Injunction in Bankruptcy. 1, 2.

DISTRIBUTION—Period of - - - 522
See "Issue then Living."

DIVIDENDS—Fund in Court—Trustee Relief Act
See Trustee Relief Act. [155

DIVIDENDS—*continued.*
—— Fund in Court—Lands Clauses Act 15, 23
See Burial-ground. 1, 2.

DOCUMENTS—Production of - - 284
See Production of Documents.

DOMICIL—Foreign—Legacy duty—Children legitimated by foreign law - - 474
See Legacy Duty.

—— Foreign—Succession duty - - 378
See Succession Duty.

DOWER—8 & 9 *Vict. c.* 112—*Satisfied Term.*] *A.*, being lessee of land for ninety-nine years, created a term by way of mortgage, and subsequently acquired the fee. He afterwards became bankrupt. By agreement between his assignees in bankruptcy, himself, and the mortgagee, a deed was executed by which the mortgage debt was released, and the fee simple was conveyed to the mortgagee freed and discharged from all equity of redemption:—*Held*, upon demurrer to a bill for dower by *A.'s* widow (married in 1832), that upon the release and extinction of the mortgage debt the term which was created for the purpose of securing that debt became a satisfied term within 8 & 9 Vict. c. 112, s. 2, and afforded no protection against the claim of *A.'s* widow to dower. Anderson *v.* Pignet - - - - - 329

DYING WITHOUT ISSUE—*Will—Construction—Gift over—Failure of Condition—Words "and" "or."*] A testator gave his residuary estate to his wife for life, and afterwards to his cousin *H.* for her sole use; and should she have any legal issue by marriage, to be divided amongst them equally at twenty-one. "Should the said *H.* not survive my wife, and die without the said legal issue by marriage," he gave his residuary estate to *M.*—*H.* survived the testator's wife, but had no children:—*Held*, that the words "not survive" must be construed as equivalent to "die in the lifetime of," and that the gift over could only take effect on the death of *H.*, without children, in the lifetime of the testator's widow, which event not having happened, it failed.—*Grey* v. *Pearson* (6 H. L. C. 61) and *Brownsword* v. *Edwards* (2 Ves. Sen. 243) considered. Reed *v.* Braithwaite - - 514

EVIDENCE—Cross suit - - - 414
See Cross Suit.

—— Insane witness - - - - 420
See Insane Witness.

—— Parol, to prove intention of testator - 542
See Will speaking from Death.

—— Parol, to prove intention of testator - 578
See Mistake in Will.

—— Presumption—Woman past child-bearing
See Woman past Child-bearing. [408

—— Presumption of death—Person not heard of for seven years - - - 236
See Presumption of Death.

—— Winding-up—Contributory - - 428
See Witness in Winding-up.

EXCEPTIONS TO ANSWER—Discovery - 197
See Discovery of Defendant's Case.

EXECUTION CREDITOR—Liquidation by arrangement—Relation back to petition - 604
See Liquidation by Arrangement. 1.

FAILURE OF LIFE ESTATE—*Will—Devise of Realty—Equitable Remainder—Intermediate Rents—Residue.*] Testator devised a freehold house to trustees and their heirs, upon trust "to permit and suffer or sufficiently authorize and empower" his wife "to receive and take" the rents for her separate use; and after her decease upon similar trusts in favour of his niece *E. W.*; and from and after her decease to stand seised of the same house upon trust for all or such one or more of her children or child as she should by deed or will appoint, and in default (which happened) of appointment, upon trust for all and every the child and children of *E. W.*, "who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or be sooner married; if more than one, in equal shares as tenants in common" . . . but if no child of *E. W.* should "live to attain a vested interest in" the premises, the house was to fall into his residuary real estate. The will gave to the trustees for the time being power, with the consent of the wife during her life, to lease the house.—After the testator's death, his wife entered into receipt of the rents of the house; and after her death *E. W.* entered into receipt of the rents, and so continued until her death in 1861. Her only child, a daughter, attained twenty-one in 1870:—*Held*, that the remainder to the daughter of *E. W.* was an equitable remainder, and consequently did not fail, although the preceding life estate failed before she attained twenty-one:—*Held*, further, that the intermediate rents of the house fell into the residuary real estate.—*Riley* v. *Garnett* (3 De G. & Sm. 629) not followed. *In re* Eddels' Trusts [559

FOREIGN LAW—Children born before marriage—Legacy duty - - - 474
See Legacy Duty.

FORFEITURE—Power—Appointment by will before forfeiture - - - 433
See Forfeiture Clause.

FORFEITURE CLAUSE—*Power to appoint by Will—Forfeiture of Power—Will previously executed.*] Under a settlement a fund was held upon trust for such persons as *G.* and *B.* should jointly appoint, and subject thereto upon trust for *G.* for life, with remainder to *B.* for life, subject to determination as thereinafter mentioned, with remainder to such of a certain class as *B.* should by deed or will appoint: and it was provided that if *B.* should commit any of certain acts, his life estate should be determined and the trust fund should go as if *B.* were actually dead, and all the powers therein contained should thenceforth be exercised as if he were then dead, without prejudice to his right to exercise jointly with *G.*, either before or after the determination of the trust in his favour, the joint power reserved to them. *B.* committed an act of forfeiture, and afterwards died:—*Held*, that the sole power of appointment reserved to him was not effectually exercised by a will made prior to the forfeiture. Potts *v.* Britton - - - - 433

FORGED BILL OF LADING—*Bill of Exchange—Representation—Guarantee of Genuineness.*] A bill of exchange drawn upon the Plaintiff by his correspondent abroad against bill of lading, was sent through the Defendants, who were bankers, for presentation and collection. The bank presented the bill to the Plaintiff with this memorandum: "The bank holds bill of lading and policy for 251 bales of cotton, per *William Cummings*." The Plaintiff accepted the bill without asking to see the bill of lading, and afterwards retired it before it was due, paid the money and received the bill of lading, which proved to be a forgery.—Upon bill filed against the bank to recover back the money so paid upon the bill of exchange:—*Held*, that the memorandum did not amount to a guarantee by the bank that the so-called bill of lading was genuine; and that the Plaintiff had no equity to recover back the money. Leather *v.* Simpson - - - - 398

FORMÂ PAUPERIS—Defendant in contempt—Costs—Suitors' fund - - 290
See Contempt, Process of. 2.

FRAUDULENT CONVEYANCE—Negligence 292
See Priority by Negligence.

"**FREEHOLD HOUSES**"—*Will—Construction—Mortgage of Term to Testator—Mortgage-money held not to pass.*] The lessee for a term of years of four houses assigned the term, by way of mortgage, to the owner in fee of the immediate reversion, who afterwards devised the houses by the description of "my freehold houses," mentioning the number of the houses in the street where they were situated; and he was in possession as mortgagee at the time of his death:—*Held*, that the mortgage debt did not pass under the devise, but formed part of the testator's personal estate. Bowen *v.* Barlow - - - - 454

GENERAL ORDER, NOV. 11, 1862, r. 60 428
See Witness in Winding-up.

—— **MARCH 21, 1868** - - - 356
See Reduction of Capital and Shares.

GENERAL RULES IN BANKRUPTCY, JAN., 1870, r. 260 - - - 615
See Injunction in Bankruptcy. 2.

GIFT, ORIGINAL OR SUBSTITUTIONAL—*Will—Substituted Gift to Issue—Time when Class to be ascertained—Joint Tenants.*] Bequest to testator's wife for life, and afterwards equally between all his brothers and sisters, namely, *M.*, *E.*, *T.*, *S.*, and *F.*; but in case any of them should die leaving issue, then the part or share of him, her, or them so dying should go to his or their respective issue.—The testator died in 1842, and his widow in 1868. None of the brothers and sisters survived her. *E.* and *F.* predeceased the testator, leaving children and remoter issue, of whom some were born before and some after the death of the testator, and some died in the widow's lifetime. *M.* survived the testator, and died leaving children; *T.* survived the testator, and died without issue; *S.* survived the testator, and left one child:—*Held*, that the word "issue" was to be taken in its largest sense:—*Held*, also, that the class of issue of *E.* and *F.* were to be ascertained at the testator's death, and the class of issue of *M.* at *M.'s* death, and that in each case the issue were entitled to the parent's one-fifth share *per capita*, as joint tenants; also that the representative of *T.* and the only child of *S.* were each entitled to

GIFT, ORIGINAL OR SUBSTITUTIONAL—*contd.* one-fifth share. *Ive* v. *King* (16 Beav. 46) followed. HOBGEN *v.* NEALE - - - - 48

GREAT-NEPHEW - - - - - 97
See NEPHEWS AND GREAT-NEPHEWS.

GUARANTEE—Forged bill of lading—Genuineness - - - - - 398
See FORGED BILL OF LADING.

HEIR-AT-LAW—Opposition to will—Costs 472
See UNSUCCESSFUL OPPOSITION TO WILL.

HOTCHPOT CLAUSE—*Covenant to settle—Will—Satisfaction—Share of Residue—Amount of Estate for Distribution.*] A testator, after providing for the payment of his debts, directed that his residuary estate should be divided amongst his nine children equally if it did not exceed £40,000, but if it exceeded that amount, in such a way that the shares of his sons should be one-twentieth greater than the shares of his daughters. He then recited that he had covenanted, in the marriage settlement of one of his daughters, to make a certain provision for her, and directed that any money paid by his executors to the trustees of the settlement in pursuance of the covenant should be taken *pro tanto* as part of the daughter's share under the will, and brought into hotchpot and accounted for accordingly. The state of the testator's property was such that it exceeded £40,000 if the amount which the executors became liable to pay under the covenant was included in it for the purpose of distribution, but not otherwise :—*Held*, that the effect of the hotchpot clause was to make the estate for the purpose of distribution as if the debt created by the covenant had never existed, and that it must be distributed as exceeding £40,000. FOX *v.* FOX - - - 142

HUSBAND AND WIFE—Separate use—Second marriage - - - - 5
See SEPARATE USE.

—— Settlement—After-acquired property 279
See COVENANT TO SETTLE.

—— Wife's debt—Separate estate—Charging order - - - - - 470
See MARRIED WOMEN'S PROPERTY ACT.

—— Woman past child-bearing—Presumption
See WOMAN PAST CHILD-BEARING. [408

ILLEGITIMATE CHILDREN—Legitimated by foreign law - - - - 474
See LEGACY DUTY.

IMPLICATION—Absolute gift at twenty-one 146
See IMPLIED GIFT AT TWENTY-ONE.

IMPLIED GIFT AT TWENTY-ONE—*Will—Construction—Conditional Gift over.*] A legacy was directed to be held on trust for *D.*, "should he survive my sister *T.*; should he not survive her, nor attain his twenty-first year," over:—*Held*, that an absolute gift to *D.* at twenty-one must be implied. *In re* THOMPSON'S TRUSTS - - 146

INCOME AND CORPUS—Fund in Court—Dividends - - - - - 155
See TRUSTEE RELIEF ACT.

INDEMNITY—Failure of—Transfer of business of insurance company - - - 164
See AMALGAMATION OF COMPANIES. 2.

INFANT—Settlement by Court—Confirmation of dealings with trust funds - - 439
See SETTLEMENT BY THE COURT.

INJUNCTION—Bankruptcy Act, 1869 - 214, 615
See INJUNCTION IN BANKRUPTCY. 1, 2.

—— Dissolution of—Amendment of bill - 31
See CONTEMPT, PROCESS OF. 1.

—— Nuisance—Adjoining property - 338
See NUISANCE TO ADJOINING PROPERTY.

—— Trade-mark—"The original" - 446
See TRADE-MARK.

INJUNCTION IN BANKRUPTCY—*Bankruptcy Act*, 1869, *ss.* 95, 125, 126—*Distress—Seizure and Sale—Distinction between Liquidation by Arrangement and Composition with Creditors.*] Distress under a statutory power, levied by a gas company against the goods of a debtor, who, on the day of, but after the seizure, filed a petition for liquidation by arrangement, and obtained an *ex parte* injunction restraining the sale of the goods seized. At the first meeting of creditors a composition under the 126th section of the *Bankruptcy Act*, 1869, was resolved upon by the requisite majority of creditors, and the resolution was afterwards duly confirmed and registered. Subsequently, on the application of the debtor, the order appealed from was made, directing the company to deliver up the goods seized by them under the distress:—*Held*, that the order must be discharged. Cases of liquidation by arrangement under sect. 125, and composition with creditors under sect. 126, distinguished. *Ex parte* BIRMINGHAM GASLIGHT AND COAL COMPANY. *In re* ADAMS - - 204

2. —— *Bankruptcy Act*, 1869, *ss.* 13, 34—*Gen. Rules of Jan.*, 1870, *Rule* 260—*Distress for Rent—Execution or other legal Process.*] Distress for rent is not "an execution or legal process" within the meaning of those terms in sect. 13 of the *Bankruptcy Act* of 1869, and Rule 260 of the Gen. Rules of Jan, 1870; therefore, where a gas company who, by an express section in their special Act, were authorized to recover rent and charges due to them for gas "by the same means as landlords may recover rent in arrear," after notice of the filing of a petition for liquidation by arrangement distrained upon the goods of the petitioning debtors for a sum due for gas supplied, and the County Court Judge granted an injunction under the *Bankruptcy Act*, 1869, restraining further proceedings in the distress:—*Held*, that the injunction had been improperly granted, and that the distress was good against the trustee under the liquidation. *Ex parte* BIRMINGHAM AND STAFFORDSHIRE GAS LIGHT COMPANY. *In re* FANSHAW & YORSTON - - - - - 615

INSANE WITNESS—*Practice—Evidence—Affidavit—Jurat.*] Before the affidavit of a person suffering from mental delusions, and in confinement in a lunatic asylum, can be received, his mental condition must first be ascertained by preliminary inquiry before the Court or some person specially delegated for that purpose; and therefore an affidavit sworn by a person in a lunatic asylum, without any notice in the jurat of the circumstances under which or the place where it was sworn, was ordered to be taken off the file. SPITTLE *v.* WALTON - - - - - 420

INTEREST—Mortgage for a time certain—Implied proviso for punctual payment - 591
See Mortgage for a Time certain.

INTERROGATORIES—Amendment of - 425
See Amendment of Interrogatories.

INVESTMENT BY TRUSTEES — *Loss of Trust Fund — Investment on Mortgage — Negligence of Solicitor — Liability of Trustee.*] A trustee is liable for the loss of a trust fund occasioned by his solicitor having neglected to take proper precautions on the occasion of the investment of the fund on mortgage. Whether the loss falls on the trustee if occasioned by a fraud practised on him, *quære*. Hopgood *v.* Parkin - - 74

2. —— *Discretion — Surviving Trustee.*] Whether a power to *A.* and *B.*, or others, the trustees of a will for the time being, to make such investments of the funds subject thereto as they may in their discretion think fit, authorizes the survivor of *A.* and *B.* to invest in foreign securities, *quære*. Zambaco *v.* Cassavetti 439

ISSUE—"Then living," Gift to - - 522
See "Issue then Living."

—— When to be ascertained—Joint tenants 48
See Gift, Original or substitutional.

ISSUE AT LAW—Costs of—Heir-at-law against devisee - - - - 472
See Unsuccessful Opposition to Will.

"ISSUE THEN LIVING" — *Will—Remoteness—Trust for Sale and Distribution after Estate tail—Period of Division—Joint Tenancy or Tenancy in common — Words of Severance and Equality.*] Where estates are devised in tail, with remainder to trustees for sale and distribution of the proceeds among a class, the gift of the proceeds is void unless the class must be ascertained within the period allowed by the rule against perpetuities. The will of *W. G.* contained a direction to the trustees, after the failure of limitations for life and in tail to sell and pay a share of the proceeds to the children of *A. H.* "then living," and the issue of such as should be then dead, leaving issue, share and share alike, such issue to take no greater share than their parent would have had if living, and to pay another share to *P. J.* for life, with remainder over as to one moiety to the children of *A. H.* "then living," and such other issue as in respect of the first share, and as to the other moiety to the children of *P. J.* "then living":—*Held*, that the words "then living" in both clauses relating to the children of *A. H.* referred to the same class of children, namely, those living at the failure of the prior limitations: but that the same words in the clause relating to the children of *P. J.* referred to the class living at the death of *P. J.*:—*Held*, also, that the children of *A. H.* took as tenants in common with the classes of issue of deceased children: but that the members of each such class took as joint tenants *inter se*. Heasman *v.* Pearse - - 522

JOINT TENANT OR TENANT IN COMMON—*Will—Payment of Testator's Debts.*] A testator directed his debts to be paid in the first instance by his executor and executrix. He then gave all the residue of his real and personal estate to his brother and sister, to hold the same unto his said brother and sister, their heirs, executors, administrators, and assigns; but in case his brother died in the lifetime of his sister, without leaving issue, then he gave his share and interest in the property to his sister absolutely, and he appointed his brother and sister executor and executrix of his will. The brother died before the testator, leaving a son, who was the testator's heir-at-law, and the testator's personal estate was not sufficient for payment of his debts:—*Held*, that the gift of the residue to the testator's brother and sister was a gift to them as tenants in common, and that the share of the sister and the share of the brother, which had lapsed to the heir-at-law, must bear the debts equally. Ryves *v.* Ryves - - - 539

—— Gift to issue - - - - - 48
See Gift, Original or substitutional.

—— Gift to "issue then living" - - 225
See "Issue then Living."

JUDGMENT DEBT—Married woman—Debt before marriage - - - - 470
See Married Women's Property Act.

JURAT—Affidavit of insane witness - 420
See Insane Witness.

JURISDICTION—Bill for money demand - 215
See Misrepresentation in Prospectus.

—— Concurrent of law and equity—Money demand - - - - - 254
See Bill for Account.

—— Justices—Accommodation works by railway company — Concurrent jurisdiction of Chancery - - - - 116
See Accommodation Works.

—— Petition under Lands Clauses Act, s. 78—Payment out of Court - - 410
See Payment out of Court.

LAPSE—Failure of life estate—Intermediate rents - - - - - 559
See Failure of Life Estate.

LEAVE TO PROCEED AFTER WINDING-UP—*Company—Winding-up—Specific Performance—Leave to enforce an Answer — Companies Act, 1862, ss. 87, 151.*] A vendor's suit was instituted against a company for specific performance, and an injunction obtained restraining an action to recover the deposit-money paid on the contract. Interrogatories were filed, but before the answer was put in the Defendant company was in course of voluntary winding-up under supervision. On a summons for leave to continue the suit, notwithstanding the winding-up, the Court gave leave to enforce an answer, but directed that no further proceedings should be taken without leave of the Court. Thames Plate Glass Company *v.* Land and Sea Telegraph Company - - 248

LEGACY—Specific or demonstrative - 506
See Legacy, Specific or demonstrative.

LEGACY DUTY—55 *Geo.* 3, *c.* 184, *s.* 2—*Stranger in Blood—Children Legitimated by Foreign Law—Domicil—Status.*] The proceeds of land in *England* devised by a British subject domiciled in *France* on trust to sell and pay the proceeds to his daughters born of a French mother before marriage, but afterwards legitimated according to French law:—*Held*, liable to legacy duty at £1 per cent. only. Skottowe *v.* Young - - 474

LEGACY, SPECIFIC OR DEMONSTRATIVE—A testator, reciting that he was entitled, after the death of his sister, to £5602 consols, bequeathed to his son the sum of £2000 consols, part thereof, or a sum equal thereto, to be transferred or paid to him when the same should be received by his executors. After the date of his will the testator's sister died, and he received the £5602 consols, which he sold out and mixed with his other moneys. He afterwards confirmed his will by a codicil, but died without having any sum of consols:—*Held*, that the legacy was specific; and that the particular fund, part of which was given to the son, being no longer in existence, the legacy failed. Observations on *Le Grice* v. *Finch* (3 Mer. 50). Oliver *v.* Oliver - - 506

LEGATEE—Misdescription of - - 578
See Mistake in Will.

LIEN—Solicitor—Charge on property recovered
See Solicitor's Lien. [181

LIQUIDATION BY ARRANGEMENT—*Bankruptcy Act*, 1869, *s.* 95, *sub-s.* 3; *s.* 125—*Execution—Seizure and Sale—Act of Bankruptcy—Relation back.*] The filing of a petition for liquidation by arrangement is an act of bankruptcy "available for adjudication" within the meaning of the 95th section, sub-sect. 3; and the title of the trustee appointed in the liquidation relates back in the same manner as the title of a trustee under a bankruptcy.—Therefore, where a petition for liquidation by arrangement had been filed by a debtor before seizure of his goods under an execution, and notice of the filing was given to the solicitors of the execution creditor before sale, and the goods were afterwards sold by the sheriff to the solicitors, who were restrained by injunction from removing them:—*Held*, that the goods must be delivered up to the trustee who had been appointed in the liquidation. *Ex parte* Duignan and Others. *In re* Bissell Brothers - 604

2. —— *Bankruptcy Act*, 1869, *s.* 126—*Gen. Rules of Jan.*, 1870, *Rule* 295—*Composition—Registration of Resolution—Examination of Debtor and Witnesses.*] The proper time for investigation into the affairs of a debtor, who has filed a petition for liquidation by arrangement with his creditors, is at the meetings of creditors; and the Registrar has no power, upon the presentation to him for registration of a resolution for composition, to direct an examination before him of the debtor or other witnesses. *Ex parte* Levy & Co. *In re* Varbetian & Co. - - - - 619

—— Distinguished from composition with creditors [204
See Injunction in Bankruptcy. 1.

LLOYD'S BONDS—*Company—Contractor—Invalid Issue of Bonds—Purchaser for Value—Acknowledgment by Company.*] *Lloyd's* bonds payable in three years, with interest in the meantime, were given by a company to their contractor as compensation for the surrender of the contract. Two of these bonds were purchased for value from the contractor, without notice of the arrangement between him and the company. The bonds and the transfers were registered in the company's books. The transferee sued the company for eighteen months' interest, and recovered the amount due. Subsequently proceedings at law were taken against the company to recover principal and interest, and judgment was entered up by consent against the company, which was then ordered to be wound up:—*Held*, upon adjourned summons, that, whether the bonds were valid or invalid in the hands of the contractor, the official liquidator was precluded by the subsequent conduct of the company from questioning their validity in the hands of a purchaser for value without notice. The transferee was therefore admitted as a creditor of the company for principal, interest, and costs. *In re* South Essex Estuary Company. *Ex parte* Chorley - - - - 157

LONDON, CHATHAM, AND DOVER RAILWAY (ARBITRATION) ACT, 1869 (32 & 33 *Vict. c. cxvi.*)—*Vendor and Purchaser—Railway Company—Line "worked and maintained" by another Company under Resolution of Directors—Unpaid Vendor's Rights.*] By the *London, Chatham, and Dover Railway (Arbitration) Act*, 1869, amongst the matters (sect. 17) referred to the arbitrators were, the legal and equitable rights and interests of companies whose lines were worked by the company, the rights of any persons having or claiming any lien upon any lands in which the company were interested, and all matters in question in all suits in which the company were parties; and it was enacted that the powers of the arbitrators should extend to ascertain and determine the matters aforesaid. It was also enacted (sect. 18) that the *Crystal Palace Railway* should be "worked and maintained" by the company "as an integral part of the company's undertaking;" that certain half-yearly payments should be made to the *Crystal Palace Railway Company*, and that such payments, and the property of the *Crystal Palace Railway Company*, should be subject, "as respected the creditors of that company, to the same rights and remedies as could now be enforced against the tolls and property of that company."—At this date the *London, Chatham, and Dover Railway Company* were working the *Crystal Palace Railway* line under a resolution of their own directors, without any lease or agreement; and a suit was pending against both companies by an unpaid vendor of lands of which possession had been taken by the *Crystal Palace Company* in 1864 and 1865, and upon part of which the line had been constructed. In this suit the *London, Chatham, and Dover Company* (who were made co-Defendants by amendment) had answered, pleading that they were unnecessary parties; but at the hearing, in March, 1868, it was declared that, upon default of payment within one month by the *Crystal Palace Company* of what should be certified to be due, the Plaintiffs would be entitled to a lien on the lands against both companies. Default was made by the *Crystal Palace Company*, and shortly afterwards proceedings in the suit were, by the arbitrator's first award, stayed as against the *London, Chatham, and Dover Company* only.—Upon Petition by the Plaintiffs, praying that the amount due under the above order for principal, interest, and costs might be raised by a sale of the lands, and in the meantime for an injunction and receiver, and other relief:—*Held*, that the *Arbitration Act* did not interfere with the rights of the Petitioners; and

LONDON, CHATHAM, AND DOVER RAILWAY (ARBITRATION) ACT—*continued.*
order made as prayed. Earl St. Germans *v.* Crystal Palace Railway Company - 568

LORD MAYOR'S COURT—*Practice—Bill of Certiorari—Removal of Suit.*] Where a suit in the Lord Mayor's Court was removed by writ of *certiorari* into the Court of Chancery, and where it appeared upon the face of the bill in the Mayor's Court that some of the Plaintiffs were out of the jurisdiction of that Court, an order was made *ex parte*, without further evidence that the suit in the Mayor's Court be retained in this Court.—An order was also made in the suit from the Mayor's Court that the Registrar of that Court might be at liberty to pay over to the credit of the cause in this Court the money paid into the Mayor's Court. Tracy *v.* Open Stock Exchange - - 556

LORD OF MANOR—Production of title-deeds—Suit respecting common - - 284
See Production of Documents.

LUNACY—Insane witness—Form of jurat - 420
See Insane Witness.

MARRIED WOMEN'S PROPERTY ACT, 1870 (33 & 34 *Vict. c.* 93), *s.* 12—*Judgment Debt—Married Woman—Debt incurred before Marriage—Separate Estate—Restraint on Anticipation—Charging Order—3 & 4 Vict. c.* 82, *s.* 1.] Sect. 12 of the *Married Women's Property Act*, 1870, extends to property settled to the separate use of a married woman without power of anticipation.—After the passing of the *Married Women's Property Act*, 1870, and on the same day on which a marriage took place, but subsequently thereto, judgment was entered up against the wife for a debt incurred previously to the marriage. The judgment creditors subsequently obtained a charging order on the wife's interest in a fund in Court, to the income of which the wife was entitled, for her separate use, without power of anticipation:—*Held*, that the charging order constituted a valid incumbrance on the fund. Sanger *v.* Sanger [470

MINES—Wrongful working—Mode of taking account - - - - 188
See Adjoining Coal-mine.

MISREPRESENTATION IN PROSPECTUS—*Demurrer—Bill for Money Demand—Concurrent Jurisdiction of Court of Chancery.*] Demurrer to a bill alleging fraud committed by the Defendants, and seeking to recover money paid by Plaintiff for shares in a company in reliance on fraudulent misrepresentations by the Defendants, overruled.—Observations on *Ogilvie* v. *Currie* (37 L. J. (Ch.) 541). Hill *v.* Lane - - 215

MISTAKE IN WILL—*Legacy—Misdescription of Object—Difference between Equivocation and Misdescription—Evidence.*] Testator devised and bequeathed his real and personal estate to trustees absolutely, upon trust, as to one moiety of the personalty, to pay and divide the residue equally between and amongst his nephew *John* and his niece *Hannah* (whom he described as the children of his late brother *Joseph*), "and all and every the children of my late nephew *Mark Ingle* and my niece *Eliza Wheelwright*," share and share alike. He then desired his trustees to stand possessed of a moiety of the proceeds of the sale of his realty, upon trust to divide the same, as before mentioned.—In a codicil, testator referred to the "legacy left and apportioned to my niece *Eliza*."—Some years before the date of the will a brother of the testator, named *Mark*, had died, leaving three sons, the two Petitioners and a third son, named *Mark*. The evidence shewed that, at the testator's death, the nephew *Mark*, who had had a son born to him in *England*, and had emigrated to *America*, where he had another child, was still living; also, that the testator knew of the birth in *England* of the child of *Mark*, and of his emigration to *America*, and that from some circumstances he (the testator) had, shortly before the date of the will, been led to suppose that *Mark* might be dead:—*Held*, that by the words "my late nephew *Mark*," the testator meant his (living) nephew *Mark*, and not his late brother *Mark*:—*Held*, also, that, there being only one living person answering to the name *Mark Ingle*, this was not a case of equivocation, and that evidence of intention was not admissible:—*Held*, further, that by the words "and my niece *Eliza*," the testator intended a gift to *Eliza*, and not a gift to the children of *Eliza*. *In re* Ingle's Trusts - - 578

MONEY—"Bequeathed or devised" - 1
See Mortmain.

—— Gift of—What passes - - - 232
See "Principal Moneys."

MONEY DEMAND—Fiduciary relation - 254
See Bill for Account.

—— Misrepresentation - - - 215
See Misrepresentation in Prospectus.

MORTGAGE—Debt—Devise of mortgaged property - - - - - 454
See "Freehold Houses."

—— For a time certain - - - 591
See Mortgage for a Time certain.

—— Legal estate—Notice - - - 53
See Purchase for Value without Notice.

—— Priority—Negligence in executing conveyance - - - - - 292
See Priority from Negligence.

—— Public-house—Custom of trade - 459
See Mortgage of Public-house.

—— Term—Release of mortgage—Satisfaction of term - - - - - 329
See Dower.

MORTGAGE FOR A TIME CERTAIN—*Mortgagor and Mortgagee—Agreement for Mortgage—Implied Proviso that Interest be punctually paid—Equitable Plea to Action—Delay.*] Where an agreement for a mortgage contains a stipulation that the principal money shall not be called in for a certain time, the Court, in settling the form of the deed will, although the agreement be silent on the subject, insert a proviso that the postponement shall be conditional on punctual payment of interest and, if the property be leasehold, on observance of the covenants; so that, if the mortgagor should make default in either of these respects, the mortgagee's remedies by sale or foreclosure will immediately arise. Seaton *v.* Twyford - - 591

MORTGAGE OF PUBLIC-HOUSE — *Priority — Mortgage to secure further Advances—Charge subject to prior Security—Advances by first Mortgagee after Notice of Charge—Publican, Brewer, and Distiller—Custom of Trade.*] The lessee of a public-house in *London* executed at the public-house, and at the time of entering into possession thereof, a mortgage of his lease in favour of the brewer by whom the house was supplied with beer, to secure a sum already advanced, and future advances not to exceed in the whole a given sum. At the same time and place he charged the lease, "subject to the security already given" to the brewer, with the repayment to the distiller who supplied the house with spirits of an advance made by him. The mortgage and charge were both executed in the presence of the solicitors of the brewer and distiller, and the latter there and then gave to the former a formal notice of the charge in favour of his client. Afterwards the publican became indebted to the brewer for the price of beer supplied to the house.—The lease having been sold by the brewer under a power of sale in his mortgage:—*Held*, that, in the absence of any express agreement, the distiller was entitled to be repaid his advance out of the purchase-money in priority to the debt which had been incurred to the brewer subsequently to the time when notice was given to him of the distiller's charge; and that this priority was not affected by a custom of trade alleged to exist between publicans, brewers, and distillers in *London*. MENZIES *v.* LIGHTFOOT [459

MORTMAIN—9 *Geo.* 2, *c.* 36—*Impure Personalty—Power to take Money bequeathed or devised.*] By a private Act of Parliament a charitable institution was incorporated and empowered to have, hold, receive, and retain any sums of money paid, given, devised, or bequeathed by any person for the charitable purposes in the Act mentioned; and also to purchase, take, or receive, and thenceforth hold and enjoy any lands, tenements, and hereditaments, in the whole not exceeding two acres, without incurring any of the penalties or forfeitures of the *Statute of Mortmain*:—*Held*, that the charity could not take a bequest of impure personalty. NETHERSOLE *v.* SCHOOL FOR THE INDIGENT BLIND - - - - - 1

MOTION—Committal for contempt - 31, 290
See CONTEMPT, PROCESS OF. 1, 2.

—— Suppression of evidence in cross suit - 414
See CROSS SUIT.

MUTUAL INSURANCE COMPANY—Winding-up—Sale of business - - - 65
See AMALGAMATION OF COMPANIES. 1.

NEGLIGENCE—Solicitor of trustee—Loss of trust fund - - - - - 74
See INVESTMENT BY TRUSTEES.

—— Mortgage—Priority - - - 292
See PRIORITY FROM NEGLIGENCE.

NEPHEWS AND GREAT-NEPHEWS — *Will — Great-Nephew sharing with Nephew.*] Gift by will of proceeds of sale of an estate to testator's great-nephew, and to such other of his nephews and nieces as should be living at his own and his sister's decease, equally:—*Held*, that the great-nephews and great-nieces were entitled equally with the nephews and nieces, as being classed with the great-nephew. *In re* BLOWER'S TRUSTS 97

NOTICE—Allotment of shares - - 86
See ACCEPTANCE OF SHARES. 1.

—— Constructive — Plea of purchase without notice - - - - 53
See PURCHASE FOR VALUE WITHOUT NOTICE.

—— Winding-up—Bonds payable to bearer 478
See DEBENTURES.

NUISANCE—Adjoining property—School - 338
See NUISANCE TO ADJOINING PROPERTY.

NUISANCE TO ADJOINING PROPERTY—*Vendor and Purchaser—Covenant—Injunction—Establishment of a District National School.*] A vendor of a piece of land took from the purchaser a covenant that he would not do, or suffer to be done, on the premises, or any part thereof, anything which should be a nuisance to the vendor or his tenants, or the occupiers or owners of the "adjoining" property, or the houses to be built thereon. The purchaser, immediately after the sale, put up the piece of land again for sale by auction in lots, under conditions which required each purchaser to enter into a covenant in similar terms to the above; and each of the purchasers did enter into a covenant with his vendor that he would not do or suffer to be done on any of the premises anything which should, would, or might be deemed a nuisance to the original vendor, or the occupiers or proprietors for the time being of the "adjoining" property, or the houses to be built thereon:—*Held*, that by the word "adjoining" in the last-mentioned covenant was meant the property adjoining each lot, and not merely the property adjoining the whole piece of land originally sold; and that the owner of any lot was entitled to enforce the covenant against the owner of any other lot.—The owner of one of the lots having made a free gift of the same to the committee of a district national school, for the purpose of having a national school erected thereon:—*Held*, that the word "nuisance" in the covenant must be restricted to its technical meaning; that the establishment of a national school is not a legal nuisance; and that the establishment of such a school on one of the above lots could not be restrained by the owner of a dwelling-house built on an adjoining lot, though his property would be depreciated thereby. HARRISON *v.* GOOD - 338

ONUS PROBANDI—Death of legatee—Person not heard of for seven years - - 236
See PRESUMPTION OF DEATH.

"OR," READ "AND"—Children or legal issue 91
See CHILDREN OR LEGAL ISSUE.

PAID-UP SHARES—Payment by money's worth
See PAYMENT BY MONEY'S WORTH. [131

—— Qualification of director - 100, 242
See ACCEPTANCE OF SHARES. 2, 3.

PARTIES—Partition suit—Party out of jurisdiction - - - - 213
See PARTITION SUIT. 2.

—— Petition to appoint trustees—Heir of testator
See TRUSTEE ACT, 1850. [251

PARTITION SUIT—*Costs.*] The costs of a partition suit up to the hearing, as well as the

PARTITION SUIT—*continued.*
subsequent costs, should, in the absence of special circumstances, be borne by the several parties in proportion to their interests, as declared by the decree. CANNON *v.* JOHNSON - - - 90

2. —— *Sale — Prayer for Partition — Party out of Jurisdiction—Form of Decree—Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *ss.* 3, 9.] In a suit for sale under the *Partition Act*, 1868, the bill ought to pray for partition as well as sale; *semble*:—An immediate decree for sale may be made, although one of the parties interested is out of the jurisdiction; but the decree must be served on the absent party before the sale is proceeded with; and, *semble*, advertisement of the decree in a newspaper is not sufficient service. TEALL *v.* WATTS - - - - - - 213

3. —— *Practice—Sale*—31 & 32 *Vict. c.* 40, *s.* 4.] A sale may be decreed under the *Partition Act*, 1868, although the bill contains no prayer for partition. ASTON *v.* MEREDITH - - 601

PAYMENT BY MONEY'S WORTH—*Shares in a Company—Confederate Bonds—Power of Directors to receive Money's Worth.*] Upon an adjourned summons to place the holder of shares on the list of contributories of a company formed for running the blockade of the *Confederate States*, it appeared that the managing director had agreed to accept Confederate or cotton bonds in payment of the amount due for the shares, and that the shareholder was credited with the amount in the company's ledger, and his shares entered as fully paid up. A letter was subsequently written by the managing director to the shareholder, intimating that payment in bonds would be taken from subscribers for increased capital for only so much as they produced in money. The bonds, at the time they were accepted, were saleable at the price at which they were received in payment, but became afterwards worthless:—*Held*, that the directors had power to receive money's worth in payment of shares; that the Confederate bonds having been accepted as payment, and the shareholder credited with the amount, and the shares entered as fully paid up, he could not now be placed on the list of contributories, and that the letter of the director having been written after the agreement was part performed did not invalidate the original transaction. *In re* MERCANTILE TRADING COMPANY. SCHRODER'S CASE - - - 131

PAYMENT OUT OF COURT—*Lands Clauses Act*, 1845, *s.* 78—*Purchase-money paid into Court—Petition of Claimant—Jurisdiction.*] Lands having been taken by a railway company, the value awarded, abstract furnished, and no objections raised, the company took possession, but did not pay the money until bill filed by the vendors, who obtained a decree ordering payment on a certain day of the sum awarded, interest from the date of taking possession, and costs. Immediately before the day on which payment was to be made, the company, alleging that the abstract shewed a title to a moiety only of the lands, gave notice of their intention to pay the money into Court; and they did pay into Court the sum awarded to an account entitled "*Ex parte* the company, The account of the vendors." They afterwards paid to the vendors a sum (alleged to

PAYMENT OUT OF COURT—*continued.*
be insufficient) as for interest.—Upon Petition presented by the vendors, in the suit, and in the matter of the *Lands Clauses Act*, 1845:—*Held* that the Court had jurisdiction, under the 78th section, to order the money to be paid over to the Petitioners. GALLIERS *v.* METROPOLITAN RAILWAY COMPANY - - - - - 41

—— Woman past child-bearing - - 40
See WOMAN PAST CHILD-BEARING.

PETITION—Winding-up - - 149, 32
See WINDING-UP PETITION. 1, 2.

PLEADING—Discovery—Exceptions to answer [19
See DISCOVERY OF DEFENDANT'S CASE.

—— Partition suit—Prayer for partition 60
See PARTITION SUIT. 2, 3.

—— Plea of purchase without notice - 5
See PURCHASE FOR VALUE.

POST-NUPTIAL SETTLEMENT — Advancement under power in father's settlement 45
See ADVANCEMENT. 2.

POSTING LETTER—Notice of allotment - 8
See ACCEPTANCE OF SHARES. 1.

POWER—Advancement - - - 45
See ADVANCEMENT. 2.

—— Appointment—Reference to power - 37
See REFERENCE TO POWER.

—— Appointment — Restraint on anticipation—Remoteness - - - - 33
See RESTRAINT ON ANTICIPATION.

—— Forfeiture of - - - - 43
See FORFEITURE CLAUSE.

—— To take money bequeathed or devised—Charity—Mortmain - -
See MORTMAIN.

PRACTICE — Administration summons — Real estate - - - -
See ADMINISTRATION SUMMONS.

—— Amendment—Interrogatories - - 42
See AMENDMENT OF INTERROGATORIES.

—— Amendment of petition—Subsequent facts [25
See AMENDMENT OF PETITION.

—— Amendment and special case - 264, 36
See SPECIAL CASE.

—— Certiorari—Lord Mayor's Court - 55
See LORD MAYOR'S COURT.

—— Contempt, Process of - 31, 29
See CONTEMPT, PROCESS OF. 1, 2.

—— Cross suit—Evidence - - - 41
See CROSS SUIT.

—— Evidence of insane witness - - 42
See INSANE WITNESS.

—— Interrogatories—Amendment - - 42
See AMENDMENT OF INTERROGATORIES.

—— Partition suit - - - 90, 213, 60
See PARTITION SUIT. 1—3.

—— Production of documents - - 28
See PRODUCTION OF DOCUMENTS.

—— Revivor and supplement - - 28
See REVIVOR AND SUPPLEMENT.

—— Special case—Amendment - 264, 36
See SPECIAL CASE. 1, 2.

PRACTICE—*continued.*
—— Suits for similar objects - - 439
See SUITS FOR SIMILAR OBJECTS.
—— Trustee Act—Service of heir of testator 251
See TRUSTEE ACT, 1850.
—— Winding-up—Evidence in - - 428
See WITNESS IN WINDING-UP.
PRESUMPTION—Death—Person not heard of for seven years - - - - 236
See PRESUMPTION OF DEATH.
—— Intention—Advancement to son - 10
See ADVANCEMENT. 1.
—— Woman past child-bearing - - 408
See WOMAN PAST CHILD-BEARING.

PRESUMPTION OF DEATH—*Will—Burden of Proof—Residuary Legatee—Representative of Person not heard of for Seven Years.*] Where a person, who is presumed to be dead from not having been heard of for seven years, is a legatee under the will of a person dying within seven years after his disappearance, the burden is upon his representative, as against the residuary legatee under the will, to prove that he survived the testator; and in the absence of proof the legacy lapses.—*In re Phené's Trusts* (Law Rep. 5 Ch. 139) followed. *In re* LEWES' TRUSTS - 236

"PRINCIPAL MONEYS"—*Will—Words—Personal Property included.*] A testator directed the income arising from his principal money to be paid to his wife, while unmarried, for the support of herself and the education of his children, and at her death or marriage to be divided among them. The testator had but little money, strictly so called, but he had large personal property and some freehold property:—*Held*, that the whole of the personal property passed, including leaseholds; but not the freehold property. PRICHARD *v.* PRICHARD - - - - - - 232

PRIORITY—Bills of sale—Taking possession 209
See BILL OF SALE.
—— Mortgage—Negligence - - 292
See PRIORITY FROM NEGLIGENCE.
—— Mortgage of public-house—Custom of trade [459
See MORTGAGE OF PUBLIC-HOUSE.

PRIORITY FROM NEGLIGENCE—*Mortgage—Priority—Fraudulent Conveyance—Negligence in executing Conveyance and signing Receipts.*] *Hunter* and *Darnell* were two mortgagees of an estate, the title-deeds to which were placed in the hands of *Walters*, a solicitor, in whom all parties had implicit confidence.—*Walters*, without authority from any of the parties, sold the estate to a nominal purchaser, who resold it to *Walters* himself, and the conveyance, dated in June, 1853, was made in execution of a power of sale in *Darnell's* mortgage. *Hunter* joined in the conveyance, and both he and *Darnell* executed it without reading it, and in ignorance of its real nature, believing at the time that it was a mere formal deed, which would not affect their mortgagees, and both of them signed the usual indorsed receipt for purchase-money, without having received the amount of their charges. *Walters* then mortgaged the estate to *Curling*, and deposited the title-deeds with him. The interest upon the two prior mortgages having been regularly paid during *Walter's* lifetime, the fraud was not discovered till his death, in 1865. Three suits were instituted to determine the priority of the mortgagees:—*Held*, that *Hunter* and *Darnell*, though they executed the conveyance of 1853 in ignorance of its contents, had passed the estate to *Walters*; that they had, by signing receipts for the purchase-money, armed *Walters* with the power of dealing with the estate as the absolute owner, and had thereby given priority to *Curling*, the subsequent mortgagee; and that a plea of purchase for valuable consideration was as available to the purchaser of an equitable as of a legal estate. HUNTER *v.* WALTERS. CURLING *v.* WALTERS. DARNELL *v.* HUNTER - - - - - 292

PRODUCTION OF DOCUMENTS—*Practice—Common of Vicinage—Title-deeds.*] The Plaintiff filed a bill to establish a right of common of vicinage over a common within a manor of which the Defendant was lord. By his answer, the Defendant denied the Plaintiff's right:—*Held*, that the Plaintiff was entitled (1) to production of the records of, and documents relating to, Courts Baron held within the manor; (2) to the production of accounts and memoranda relating to the digging of gravel and cutting of turf on the common; (3) to have a list of the documents relating to the title of the Defendant as lord of the manor; but (4) not to have such documents produced, the Defendant stating by affidavit that they related exclusively to his own title as lord of the manor, and did not in any way tend either to establish the rights claimed by the Plaintiff or to defeat the Defendant's defence to the suit. MINET *v.* MORGAN - - - - - 284

PROMISSORY NOTE— Bonds payable to bearer
See DEBENTURES. [478

PROMOTERS—Bonus to—Promotion-money 100, 242
See ACCEPTANCE OF SHARES. 2, 3.

PUBLIC-HOUSE—Mortgage of—Priority of advances—Custom of trade - - 459
See MORTGAGE OF PUBLIC-HOUSE.

PURCHASE FOR VALUE WITHOUT NOTICE—*Breach of Trust—Investment on Mortgage—Release of Part of Mortgaged Property—Notice—Legal Estate.*] A plea of purchase for value without notice cannot be supported if a deed or document under which the purchaser derives his title gives constructive notice of the title of the adverse claimant; and this holds even if such deed or document has been concealed from the purchaser.—In 1851 a mortgage of real estate was made to three persons, the mortgage deed disclosing the fact that the mortgage-money was held by the mortgagees upon trust. In 1856 the mortgagor induced the survivor of the three trustee mortgagees, in breach of his duty as trustee, to execute a reconveyance of part of the mortgaged property of such a character as to put any one who saw it upon inquiry which would have disclosed the breach of trust. The mortgagor then made a fresh mortgage to other persons, from whom he concealed the existence both of the mortgage of 1851 and the reconveyance:—*Held*, that the mortgagees of 1856 could not claim the benefit of the legal estate

PURCHASE FOR VALUE WITHOUT NOTICE—*continued.*

which passed by the reconveyance without admitting that they had notice of the mortgage of 1851, and of the trusts upon which the mortgage-money was held; and could not set up the defence of purchaser without notice against the persons beneficially interested in the mortgage of 1851.—The mortgagor executed a deed purporting to convey to the surviving trustee another part of the property, in consideration of a sum of money not actually paid, but the receipt for which was indorsed. This conveyance did not refer to the mortgage of 1851:—*Held*, that a subsequent mortgagee from the surviving trustee could not set up the defence of purchaser without notice against the person beneficially interested in the mortgage of 1851, although this mortgage had been concealed from him.—*Carter* v. *Carter* (3 K. & J. 617) followed and approved. Pilcher *v.* Rawlins. Joyce *v.* Rawlins - - 53

—— Lloyd's bonds - - - 157
See Lloyd's Bonds.

PURCHASE-MONEY—Lands Clauses Act, s. 78
See Payment out of Court. [410

QUALIFICATION OF DIRECTOR — *Company — Winding-up—Contributory.*] By a local Act, which embodied the *Companies Clauses Act* (1845), it was enacted that *A.* and all other persons who had already subscribed or should thereafter subscribe to the undertaking should be united into a company for the purposes of the undertaking, that the number of directors should be four, and that the qualification of a director should be the possession of twenty-five shares in the undertaking; and further, that *A.* and three other persons named should be the first directors, and should continue in office until the first ordinary meeting, and at such meeting the shareholders might either continue in office the directors appointed by the Act or might elect a new body of directors. — At the first meeting directors were appointed other than *A.* and the three persons named in the Act, and to each of these directors twenty-five shares were allotted. No other shares were ever allotted.—*A.* never applied for nor had allotted to him, nor paid any sum of money on account of, any share in the undertaking. The company being ordered to be wound up:—*Held*, that *A.* must be settled on the list of contributories for twenty-five shares. *In re* North Kent Railway Extension Railway Company (Kincaid's Case) - - - 192

—— Paid-up shares - - - 100, 242
See Acceptance of Shares. 2, 3.

RAILWAY COMPANY—Accommodation works
See Accommodation Works. [116

—— Vendor's lien for unpaid purchase-money [568
See London, Chatham, and Dover Railway (Arbitration) Act.

RECONSTRUCTION OF COMPANY — *Contributory — Reconstruction by forming a new Company — Payments to new Company — Liability to old Company.*] The reconstruction of an insolvent company was attempted on the basis of the formation of a new company, to take over its assets and liabilities. The plan of reconstruction provided for the old company to be wound up and the shareholders to exchange their old shares, which were of £20 each, with £10 paid up, for half the number of fully paid-up shares of the new company of £10 each, and 6 per cent. debentures to an amount equal to the amount paid up upon their shares in the old company, credited with one-half thereof as paid thereon, leaving the remaining half to be paid by instalments extending over a period of two years. The shareholders were requested to assent to the proposal by signing a form of approval containing the terms of the plan, and the plan was carried out by resolutions passed at an extraordinary meeting of the company, duly confirmed at a subsequent meeting, and by a deed to which the liquidators of the old company and the two companies were parties:—*Held*, that, as the creditors of the old company were not parties to the arrangement, a shareholder who had signed the circular, expressing his assent to the arrangement, and exchanged his shares, was not entitled to treat the instalments paid upon his debentures as being in reduction of his liability to the old company. *In re* Imperial Land Company of Marseilles. *Ex parte* Jeaffreson - - - - 109

RECTIFICATION — Mortgage deed — Proviso for punctual payment of interest - 591
See Mortgage for a Time certain.

RECTOR—Burial fees—Lands Clauses Act 15, 23
See Burial-ground. 1, 2.

REDUCTION OF CAPITAL AND SHARES—*Company* —30 & 31 *Vict. c.* 131—*General Order of the 21st of March*, 1868—*Form of Order.*] A Petition having been presented by a company for confirmation of resolutions for reduction of its capital and shares, an order was made for an inquiry as to debts, and the presentation of the Petition was directed to be advertised, and a list of creditors to be left at the Judge's Chambers. This having been done, the Chief Clerk certified that a list of creditors had been settled, but that the names of some of the creditors, who were holders of the company's debentures, being unknown to the company, did not appear on the list. None of them had claimed under the 13th section of the *Companies Act*, 1867, to be entered on the list. Upon the Petition coming on to be heard, and being unopposed:—*Held*, that the debenture holders were in the position of creditors who were now excluded, under the 13th section, from the right of objecting to the proposed reduction.—Other creditors named in the list, whose debts were not yet due, and were secured, had neither assented to, nor dissented from the proposed reduction:—*Held* that they were not to be considered creditors "who do not assent," within the 14th section of the Act, but must be taken to have assented.—Fourteen days from the date of the order fixed for discontinuance of the words "and Reduced."—Form of order as to final advertisements, and otherwise. *In re* Crédit Foncier of England - - - - 356

REFERENCE TO POWER—*Power to appoint among Children by Deed—Appointment by Will—Reference to different Power—Defective Execution aided.*] By articles, on the marriage of *A.*, followed by a disentailing assurance, an estate was conveyed in trust for the children of the marriage, as *A.* should by deed appoint, and in default of appointment, for such children equally. By a subsequent assurance, which was inoperative, *A.* purported to put an end to the former power and to confer upon herself a general power of appointment over the same estate. She married a second time, and died leaving three children by the first marriage and two by the second, and having made her will, whereby, without any reference to the power in the marriage articles, pursuant to the alleged general power and in exercise of every other power enabling her, she purported to appoint the said estate to her eldest son by the first marriage, charged with a sum of £3000 in favour of all the children by both marriages other than the eldest son:—*Held*, that the will operated as a valid exercise of the power in the articles, and that the eldest son was entitled to the estate, subject to raising the sum of £3000 for the other two children of the first marriage. BRUCE *v.* BRUCE [371

REMOTENESS—Appointment—Restraint on anticipation - - - - 324
See RESTRAINT ON ANTICIPATION.

—— Gift to class—Severance of objects - 499
See SEVERANCE OF GIFT TO CLASS.

—— Issue then living - - - 522
See ISSUE THEN LIVING.

RESIDUARY GIFT—"All the rest" - 280
See "ALL THE REST."

RESTRAINT ON ANTICIPATION—*Appointment—Remoteness—Married Woman.*] Under an antenuptial settlement, by which the husband had a power of appointing a sum of money among the children of the marriage, he appointed the fund to the separate use of a married daughter, with a restriction against alienation:—*Held*, that the appointment to the separate use of his daughter was valid, discharged of the restraint upon alienation, which was too remote and void. *In re* CUNYNGHAME'S SETTLEMENT - - - - 324

—— Wife's debt—Charging order - - 470
See MARRIED WOMEN'S PROPERTY ACT.

REVERSIONARY INTEREST—Usurious bargains [265
See USURIOUS CONTRACT.

REVIVOR AND SUPPLEMENT—*Practice—Order after Decree*—15 & 16 *Vict. c.* 86, *s.* 52.] In a foreclosure suit, in which four mortgagees were Plaintiffs, after decree and before the Chief Clerk's certificate, the Plaintiffs transferred the mortgage to three of themselves and a new mortgagee. On an *ex parte* application by the three continuing mortgagees and the new mortgagee, with the consent of the other original mortgagee, an order of revivor and supplement was made under 15 & 16 Vict. c. 86, s. 52. INGHAM *v.* WASKETT - 283

SALE—Partition Act, 1868 - - 213, 601
See PARTITION SUIT. 2, 3.

SATISFIED TERM—Dower - - - 329
See DOWER.

SCHOOL—Not a nuisance - - - 338
See NUISANCE TO ADJOINING PROPERTY.

SECOND MARRIAGE—Trust for separate use 5
See SEPARATE USE.

SEIZURE AND SALE—Execution creditor—Liquidation by arrangement - - 604
See LIQUIDATION BY ARRANGEMENT. 1.

SEPARATE USE—*Marriage Settlement—Second Marriage.*] By a marriage settlement the income of the trust funds was, during the life of *L.*, to be for her separate use, independently of the control of her intended husband, and so that her receipts alone should be sufficient discharges, without power of anticipation. The husband died, and *L.* married again:—*Held*, that the trust for separate use revived on her second marriage. HAWKES *v.* HUBBACK - - - - - 5

—— Restraint on anticipation—Remoteness 324
See RESTRAINT ON ANTICIPATION.

—— —— Wife's debt - - - 470
See MARRIED WOMEN'S PROPERTY ACT.

SETTLEMENT—By Court of Chancery, effect of, in confirming dealing with trust fund—Infant - - - - 439
See SETTLEMENT BY THE COURT.

—— Covenant to settle after-acquired property [279
See COVENANT TO SETTLE.

—— Hotchpot clause - - - 142
See HOTCHPOT CLAUSE.

—— Post-nuptial—Advancement - - 452
See ADVANCEMENT.

—— Restraint on anticipation - - 324
See RESTRAINT ON ANTICIPATION.

—— Separate use - - - - 5
See SEPARATE USE.

SETTLEMENT BY THE COURT—*Infant—Confirmation—Breach of Trust.*] A settlement made with the sanction of the Court on the marriage of an infant, of certain funds alleged to represent the infant's share under a will, does not operate as a confirmation of prior dealings by the trustees of the will, so as to preclude the *cestui que trust* under the settlement from filing a bill, charging the trustees under the will with breaches of trust. ZAMBACO *v.* CASSAVETTI - - - 439

SEVERANCE OF GIFT TO CLASS—*Will—Remoteness—Rule against Perpetuities.*] Gift on trust for *A.* for life, and after her death for all her children who should attain twenty-one, and the issue of such of them as should die under that age leaving issue, "which issue shall afterwards attain the age of twenty-one years, or die under that age leaving issue at his, her, or their decease or respective deceases, as tenants in common if more than one, but such issue to take only the share or shares which his, her, or their parent or parents respectively would have taken if living." None of the children of *A.* died under twenty-one leaving issue:—*Held*, that the whole gift was not void as infringing the rule against perpetuities, but that it might be

SEVERANCE OF GIFT TO CLASS—*continued.*
severed, and the shares only would be void as to which the specified event happened. Observations on *Webster* v. *Boddington* (26 Beav. 128) and *Seaman* v. *Wood* (22 Beav. 581). *In re* Moseley's Trusts - - - - - - - 499

SOLICITOR—Charge on property recovered 181
See Solicitor's Lien.

—— Negligence—Trustee—Loss of fund - 74
See Investment by Trustees. 1.

—— Taxation—Winding-up - - 151
See Taxation of Costs.

SOLICITOR'S LIEN—*Charge upon Property recovered or preserved—23 & 24 Vict. c.* 127, *s.* 28.] In a suit by a *cestui que trust* against a trustee of landed estate, praying for an account and reconveyance, a receiver was ordered to be, and afterwards was, appointed, adversely to the Defendant. Notice of motion for decree was served, but before the time for closing evidence had arrived, the Plaintiff, without consulting her solicitor, and without his knowledge, entered into an agreement with the Defendant for a compromise of the suit on the terms, first, that a sum of cash should be paid to the Plaintiff, then that the mortgages on the property should be paid off, and then that the costs of all parties estimated at a fixed sum should be paid. Upon hearing of the compromise, the Plaintiff's solicitor applied to the Plaintiff and to the Defendant's solicitors for the terms of it, but was refused all information. Upon petition under the *Solicitors Act*:—*Held*, that the solicitor was entitled to a first charge for the amount of his taxed costs, as between solicitor and client, upon the property of the Plaintiff, as having been recovered and preserved through his instrumentality. Twynam *v.* Porter - - - 181

SPECIAL CASE—*Practice—Amendment—Birth of Tenant in Tail.*] Upon the birth, after a special case has been set down for hearing, of an infant tenant in tail, the proper course for bringing such necessary party before the Court is, that the order for setting down should be discharged, and the special case amended by making the infant a party. Savage *v.* Snell - - - 264

2. —— *Practice — Amendment — New Defendant.*] Special case amended by leave at the hearing, by adding a party in existence before the case was filed, but accidentally omitted, and ordered to be set down as amended against the new Defendant. Barnaby *v.* Tassell - - 363

SPECIFIC LEGACY — - - - 536
See Legacy, Specific or demonstrative.

SPECIFIC PERFORMANCE—Leave to proceed after winding-up - - - 248
See Leave to proceed after Winding-up.

—— Title—Voluntary settlement - - 391
See Voluntary Settlement.

STATUTES:
9 Geo. 2, c. 36—*Mortmain* - - 1
See Mortmain.
55 Geo. 3, c. 184, s. 2—*Stamps* - - 474
See Legacy Duty.
1 Vict. c. 26, s. 24—*Wills* - - 542
See Will speaking from Death.

STATUTES—*continued.*
8 Vict. c. 18, s. 70—*Lands Clauses* 15, 23
See Burial-ground. 1, 2.
—— —— s. 78 - - - - 410
See Payment out of Court.
8 & 9 Vict. c. 112, s. 2—*Dower* - - 329
See Dower.
10 & 11 Vict. c. 96—*Trustees Relief* - 155
See Trustee Relief Act.
13 & 14 Vict. c. 60—*Trustee Act* - 251
See Trustee Act, 1850.
15 & 16 Vict. c. 86, s. 52—*Chancery Improvement* - - - - - 283
See Revivor and Supplement.
—— —— s. 47 - - - - 8
See Administration Summons.
16 & 17 Vict. c. 51, s. 5—*Succession Duty* 378
See Succession Duty.
23 & 24 Vict. c. 127, s. 28—*Attorneys* - 181
See Solicitor's Lien.
25 & 26 Vict. c. 89, ss. 87, 151—*Companies* 248
See Leave to proceed after Winding-up.
—— —— s. 161 - - - - 65
See Amalgamation of Companies. 1.
—— —— s. 203 - - - - 321
See Winding-up Petition. 1.
30 & 31 Vict. c. 131, s. 13—*Companies* - 356
See Reduction of Capital and Shares.
31 & 32 Vict. c. 4—*Reversions* - - 265
See Usurious Contract.
—— c. 40, s. 4—*Partition* - - 601
See Partition Suit. 3.
—— —— ss. 3, 9 - - - - 213
See Partition Suit. 2.
32 & 33 Vict. c. 62, s. 4—*Debtors* - 31
See Contempt, Process of. 1.
—— c. 71, ss. 13, 34—*Bankruptcy* - 615
See Injunction in Bankruptcy. 2.
—— —— ss. 95, 125 - - - 604
See Liquidation by Arrangement. 1.
—— —— ss. 125, 126 - - - 204
See Injunction in Bankruptcy. 1.
—— —— s. 126 - - - - 619
See Liquidation by Arrangement. 2.
—— c. 91—*Courts of Justice* (*Salaries*) 290
See Contempt, Process of. 2.
—— c. cxvi.—*Arbitration* - - 568
See London, Chatham, and Dover Railway (Arbitration) Act.
33 & 34 Vict. c. 92, s. 12—*Married Women* 470
See Married Women's Property Act.

STRANGER IN BLOOD—Children legitimated by foreign law - - - - 474
See Legacy Duty.

SUBSTITUTED GIFT—Gift—Issue - - 68
See Gift, Original or substitutional.

SUCCESSION DUTY—*Will*—16 & 17 *Vict. c.* 51, *s.* 5—*Bequest upon Trust—Annuity—Foreign Domicil.*] A foreigner domiciled abroad bequeathed his residuary estate to four trustees (three of whom were resident in *England*), upon trusts for conversion and sale, and investment of the proceeds in consols, and upon trust to pay out of the

SUCCESSION DUTY—*continued.*
income of the consols two annuities; and he directed the trustees to set apart a sufficient fund of consols to answer the annuities, and after the determination of either annuity the fund so appropriated was to revert to and form part of his residuary estate; and, subject as aforesaid, he directed his residuary estate to be held upon trust for his children. The testator made his will and died in *London*, but had no estate within the *United Kingdom*, except the personal effects in his possession at the time of his death:—*Held*, that, upon the death of one of the annuitants, no succession duty was payable in respect of the fund appropriated to answer the annuity. CALLANANE *v.* CAMPBELL - - - - - - 378

SUITS FOR SIMILAR OBJECTS—*Practice—Decree—Breach of Trust—Ordinary Decree for Administration.*] A Plaintiff who files a bill for the administration of a testator's estate, charging the trustees and executors with breaches of trust, may bring his suit to a hearing notwithstanding that the ordinary administration decree has been obtained in a suit subsequently instituted, to which the Plaintiff is not a party. If a second decree is made, both decrees ought to be prosecuted in the same branch of the Court. Where a first suit is stayed by reason of a decree in a second suit, the Plaintiff in the first suit will ordinarily have the carriage of the decree. ZAMBACO *v.* CASSAVETTI [439

SUITORS' FUND—Pauper Defendant in custody—Application by Plaintiff - - 290
See CONTEMPT, PROCESS OF. 2.

SUPERVISION ORDER—Relates back to confirmatory resolution - - - 478
See DEBENTURES.

SURPLUS OF CHARITY - - - 35
See CHARITY NOT EXHAUSTING WHOLE INCOME.

SURVIVORSHIP—Dying without issue - 514
See DYING WITHOUT ISSUE.

TAXATION OF COSTS — *Company — Solicitor—Winding-up.*] Three months after a solicitor to a company had delivered his bill of costs the company was ordered to be wound up. Subsequently he delivered a further bill to the official liquidator. More than twelve months elapsed, and the solicitor carried in a claim for payment of both bills:—*Held*, that both bills must be referred for taxation before they could be paid. *In re* MARSEILLES EXTENSION RAILWAY AND LAND COMPANY. *Ex parte* EVANS - - - - - - 151

TENANT IN COMMON OR JOINT TENANT 522
See "ISSUE THEN LIVING."
—— - - - - - - - 539
See JOINT TENANT OR TENANT IN COMMON.

TITLE—Vendor and purchaser—Voluntary settlement - - - - - 391
See VOLUNTARY SETTLEMENT.

TRADE-MARK—*Injunction—Use of the words "The original."*] The original inventor of a new manufacture, and persons claiming under him, are alone entitled to designate such manufacture as "the original;" and if he or they have been in the habit of so designating their manufacture, an injunction will be granted to restrain another manufacturer from applying the designation to his goods. COCKS *v.* CHANDLER - - - 446

TRANSFER OF BUSINESS—Insurance company —Vendor's lien—Re-assurance policies [164
See AMALGAMATION OF COMPANIES. 2.
—— Mutual assurance company—*Ultrà vires*—Winding-up - - - 65
See AMALGAMATION OF COMPANIES. 1.

TRANSFER OF STOCK—Advancement to son—Presumption of intention - - 10
See ADVANCEMENT. 1.

TRUST—Breach of—Compromise of claim for apportionment - - - - 382
See APPORTIONMENT—TENANT FOR LIFE AND REMAINDERMAN.
—— Breach of — Confirmation — Settlement by Court—Infant - - - 439
See SETTLEMENT BY THE COURT.

TRUSTEE—Appointment of, under Trustee Act
See TRUSTEE ACT, 1850. [251
—— Investment by—Mortgage — Loss of trust fund - - - - - 74
See INVESTMENT BY TRUSTEES. 1.
—— Investment by—Discretion - - 439
See INVESTMENT BY TRUSTEES. 2.

TRUSTEE ACT, 1850—*New Trustee—Appointment where no existing Trustee—Heir of Testator before the Court.*] The Court may appoint trustees under the *Trustee Act*, 1850, where there never have been any trustees.—A testator gave his residuary real and his personal estate to three trustees, all of whom died in his lifetime. A Petition was presented under the *Trustee Act*, 1850, for the appointment of new trustees and for a vesting order:—*Held*, that all difficulty was removed by serving the heir of the testator; and that the order might be made. *In re* SMIRTHWAITE'S TRUSTS - - - - - - 251

TRUSTEE RELIEF ACT — *Costs — Payment of Money into Court—Petition as to Dividends only—Costs of Trustee.*] Where a fund had been paid into Court under the *Trustee Relief Act* on account of the inability of a sole trustee to act:—*Held*, that, on an application relating solely to the payment of the dividends, the costs of the appearance of the trustee might be properly charged on the *corpus*. *In re* WOOD'S TRUSTS - - 155

ULTRÀ VIRES—Lloyd's bonds—Estoppel 157
See LLOYD'S BONDS.
—— Mutual insurance company — Transfer of business - - - - 65
See AMALGAMATION OF COMPANIES. 1.

UNCONSCIONABLE BARGAIN - - 265
See USURIOUS CONTRACT.

UNSUCCESSFUL OPPOSITION TO WILL—*Practice—Costs—Will, Validity of—Suit by Heir-at-law against Devisee—Issue directed by Court—Adverse Verdict—Costs in Equity.*] Where the heir-at-law of a testator filed a bill against the devisee and executor impeaching the validity of the will, and an issue was directed which resulted in the validity of the will being established:—

UNSUCCESSFUL OPPOSITION TO WILL—*contd.*
Held, that the bill must be dismissed without costs as regarded the devisee, and that the Plaintiff must pay the costs of the executor. BANKS *v.* GOODFELLOW - - - - - - 472

USURIOUS CONTRACT—*Reversionary Interest—Unconscionable Bargain—31 & 32 Vict. c. 4.*] The jurisdiction of this Court over unconscionable bargains is not affected by the repeal of the usury laws, or by the 31 & 32 Vict. c. 4, as to dealings with reversionary interests.—An exorbitant rate of interest agreed to be paid by a young and needy man on the security of property in reversion, held by an indefeasible title, is unfair dealing within the 31 & 32 Vict. c. 4.—Where a young man charged his reversionary interest with exorbitant sums for interest on loans principally made to his brother, an infant, the Court decreed the charge to stand as security only for the sums actually advanced, and for interest at £5 per cent. TYLER *v.* YATES [265

USURY—Reversionary interest - - 265
See USURIOUS CONTRACT.

VENDOR AND PURCHASER—Plea of purchase without notice - - - 53
See PURCHASE FOR VALUE WITHOUT NOTICE.
—— Title—Voluntary settlement - - 391
See VOLUNTARY SETTLEMENT.
—— Vendor's lien—Railway company - 568
See LONDON, CHATHAM, AND DOVER RAILWAY (ARBITRATION) ACT.
—— Vendor's lien—Insurance company—Sale of business - - - - 164
See AMALGAMATION OF COMPANIES. 2.

VESTING—Gift over on death before marriage 222
See DEATH COUPLED WITH CONTINGENCY.
—— Failure of life estate—Equitable remainder
See FAILURE OF LIFE ESTATE. [559

VOLUNTARY SETTLEMENT—*Vendor and Purchaser—Title—Possession—Legal Estate—Willingness to complete Purchase—Specific Performance.*] On a bill by a vendor for specific performance, the Defendant, the purchaser, set up a voluntary settlement as an objection to the title, but said he was willing to complete the purchase on having a good title. He had been let into possession as purchaser, and paid part of his purchase-money, and had paid off a mortgage and got a conveyance of the legal estate and possession of the title-deeds:—*Held*, that, notwithstanding the voluntary settlement, the Plaintiff was entitled to a decree for completing the purchase.—*Semble*, the principle of *Smith* v. *Garland* (2 Mer. 123) does not apply to a Defendant who says he is willing to complete on having a good title. PETER *v.* NICOLLS - - - - - - 391

WILL—"All the rest" - - - 280
See "ALL THE REST."
—— Appointment by, under forfeited power 433
See FORFEITURE CLAUSE.
—— Charity - - - - - - 35
See CHARITY NOT EXHAUSTING WHOLE INCOME.
—— Children of brothers and sisters—Class 363
See CHILDREN OF BROTHERS AND SISTERS.

WILL—*continued.*
—— Children, or legal issue - - 91
See CHILDREN OR LEGAL ISSUE.
—— Conversion—Discretion in trustees - 80
See CONVERSION.
—— Covenant to settle—Satisfaction - 142
See HOTCHPOT CLAUSE.
—— Dying without issue - - - 514
See DYING WITHOUT ISSUE.
—— Failure of life estate—Equitable remainder
See FAILURE OF LIFE ESTATE. [559
—— "Freehold houses," Devise of—Mortgage debt - - - - - 454
See "FREEHOLD HOUSES."
—— Gift over on death before marriage - 222
See DEATH COUPLED WITH CONTINGENCY.
—— Implied gift at twenty-one - - 146
See IMPLIED GIFT AT TWENTY-ONE.
—— Issue then living - - - 522
See "ISSUE THEN LIVING."
—— Joint tenant or tenant in common - 539
See JOINT TENANT OR TENANT IN COMMON.
—— Legacy—Specific or demonstrative - 505
See LEGACY, SPECIFIC OR DEMONSTRATIVE.
—— Nephews and great-nephews - - 97
See NEPHEWS AND GREAT-NEPHEWS.
—— "Principal moneys" - - - 232
See "PRINCIPAL MONEYS."
—— Remoteness—Severance of gift to class 499
See SEVERANCE OF GIFT TO CLASS.
—— Speaking from death - - - 542
See WILL SPEAKING FROM DEATH.
—— Substituted gift - - - - 48
See GIFT, ORIGINAL OR SUBSTITUTIONAL.
—— Unsuccessful opposition to—Costs - 472
See UNSUCCESSFUL OPPOSITION TO WILL.

WILL SPEAKING FROM DEATH—*Construction—Wills Act* (1 *Vict. c.* 26), *s.* 24—*After-acquired Property—Evidence to prove Intention.*] A testator devised his mansion and estate, called *Cleeve Court*, with the appurtenances, upon certain trusts, and gave the residue of his property of every description, other than those thereinbefore mentioned, upon other trusts. The testator had contracted, before the date of his will, to purchase an estate near and adjoining to the *Cleeve Court* estate, which was conveyed to him subsequently. He also purchased, after the date of his will, several other small properties adjoining the *Cleeve Court* estate:—*Held*, that evidence was admissible to shew what property the testator designated by the particular description up to the time of his death, and that all the property acquired after the date of the will, and treated by the testator immediately before his death as additions to the *Cleeve Court* estate, passed under the particular devise. *Cole* v. *Scott* (1 Mac. & G. 518)) disapproved. CASTLE *v.* FOX - - - - - - - 542

WINDING-UP—Acceptance of shares 86, 100, 242
See ACCEPTANCE OF SHARES. 1—3.
—— Costs—Taxation - - - 151
See TAXATION OF COSTS.
—— Insurance company—Transfer of business [65, 164
See AMALGAMATION OF COMPANIES. 1, 2.

WINDING-UP—*continued.*
—— Leave to proceed in suit - - 248
See Leave to proceed after Winding-up
—— Paid-up shares - - - - 131
See Payment by Money's Worth.
—— Petitioning creditor—Disputed debt - 149
See Winding-up Petition.
—— Qualification of director - - 192
See Qualification of Director.
—— Reconstruction of company - - 109
See Reconstruction of Company.
—— Supervision order—Relating back - 478
See Debentures.

WINDING-UP PETITION — *Company—Petitioning Creditor—Disputed Debt.*] Where a creditor's Petition to wind up a company is opposed on the ground that the petitioning creditor's debt is disputed, the Court will not, as a matter of course, direct the Petition to stand over, with leave to bring an action; but is bound, before doing so, to see that the debt is disputed on some substantial ground. *In re* King's Cross Industrial Dwellings Company - - - - - 149

2. —— *Unregistered Company—Registration after Commencement of Liquidation — Vesting Order—Companies Act*, 1862, *s.* 203.] After the presentation of a Petition to wind up an unregistered company, the company was registered under the *Companies Act*, 1862, with a view to a voluntary winding-up. An order having been subsequently made on the Petition:—*Held*, that, notwithstanding the registration, the company was an unregistered company within the meaning of sect. 203 of the Act of 1862, and order made vesting in the official liquidator certain legal estates in securities outstanding in trustees for the company, to be dealt with in the winding-up. *In re* Hercules Insurance Company - - - - 321

WITNESS IN WINDING-UP—*Practice—Winding-up—Evidence—General Order of 11th Nov.*, 1862, *Rule* 60—*Contributory—Right of Cross-examination.*] A contributory of a company in course of winding-up is entitled, under the liberty given by Rule 60 of the General Order of the 11th of Nov., 1862 (under the *Companies Act*, 1862), not only to attend the cross-examination by the official liquidator of a person claiming to be a creditor of the company, but also to cross-examine such claimant upon the matters referred to in the affidavit made in support of his claim. *In re* Brampton and Longtown Railway Company - - - - - - 428

WOMAN PAST CHILD-BEARING—*Payment out of Court—Presumption—Widow aged Fifty-five Years and Four Months—Spinster aged Fifty-three Years and Nine Months.*] Money ordered to be paid out of Court on the presumption that a widow aged fifty-five years and four months, who had never had any children, and a spinster aged fifty-three years and nine months, would not have any children. *In re* Widdow's Trusts - - 408

WORDS—"Adjoining property" - - 338
See Nuisance to adjoining Property.
—— "All the rest" - - - - 280
See "All the Rest."
—— "And" read "or" - - - 514
See Dying without Issue.
—— "Et cetera" - - - - 363
See Children of Brothers and Sisters.
—— "Execution or other legal process" - 615
See Liquidation in Bankruptcy. 2.
—— "Freehold houses" - - - 454
See "Freehold Houses."
—— "Nephew"
See Nephews and Great-Nephews.
—— "Principal moneys" - - - 232
See "Principal Moneys."
—— "Rents and profits" - - - 15, 23
See Burial-ground. 1, 2.
—— "The original" - - - - 446
See Trade-mark.
—— "Then living" - - - - 522
See "Issue then Living."

BIBL. LONDIN. UNIV.

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS,
STAMFORD STREET AND CHARING CROSS.